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Chairman:	Mr. ESCOVAR-SALOM	(Venezuela)
later:	Ms. WONG (Vice-Chairman)	(New Zealand)
later:	Mr. ESCOVAR-SALOM (Chairman)	(Venezuela)

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VISIT BY THE PRESIDENT, JUDGES AND REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

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The meeting was called to order at 10.10 a.m.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (A/51/10, A/51/332 and Corr.1, A/51/358 and A/51/365)

1. The CHAIRMAN invited the Committee to begin consideration of the agenda item and said that the Committee was particularly proud of the special relationship which it enjoyed with the International Law Commission, whose outstanding contribution to the progressive development and codification of international law was universally recognized. Although meetings would be devoted to the consideration of particular chapters of the Commission's report, delegations should feel free to consolidate their comments on the entire report in a single statement. However, priority would be given at each meeting to delegations wishing to make statements on the designated topic for that meeting.

2. Mr. MAHIOU (Chairman of the International Law Commission), introducing chapters I and II of the report of the International Law Commission on the work of its forty-eighth session (A/51/10), said that at its recent session the Commission had completed the second reading of the articles of the draft Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility. In addition, a Working Group had reviewed and presented a complete set of articles together with commentaries on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The Commission had considered the second report of the Special Rapporteur on the topic of State succession and its impact on the nationality of natural and legal persons, and had agreed on the broad outline of its future work on the topic. Regarding the topic of reservations to treaties, the Special Rapporteur had submitted a comprehensive report which the Commission would consider at its next session.

3. In response to issues raised in paragraph 9 of General Assembly resolution 50/45, the Commission had adopted specific conclusions and recommendations concerning its programme, procedure and working methods. With respect to its long-term programme of work, the Commission had set out a general outline of the main legal problems raised by three of the possible future topics which, in the Commission's view, were ready for codification and progressive development.

4. The draft Code of Crimes against the Peace and Security of Mankind consisted of 20 articles which were divided into two parts. Part I contained general provisions relating to the scope and application of the Code, principles of individual criminal responsibility and punishment, and procedural and jurisdictional issues. Part II contained definitions of the five categories of crime included in the Code, namely, aggression, genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes.

5. Concerning Part I of the draft Code, he observed that article 1 limited the scope and application of the Code to the crimes listed in Part II and stipulated that such crimes were prohibited under international law and punishable as such irrespective of national law. Article 4 indicated that the provisions of the

Code concerning individual criminal responsibility were without prejudice to any question of State responsibility under international law.

6. The general principle of individual criminal responsibility was set out in article 2. Paragraph 1 stipulated that a crime against the peace and security of mankind entailed individual responsibility. That general principle was applicable to all crimes against the peace and security of mankind, whether or not they were listed in the Code, and was formulated without qualifications. Paragraph 2 reaffirmed the principle of individual criminal responsibility for the crime of aggression, which was dealt with in article 16.

7. Paragraph 3 of article 2 laid down the principle of individual criminal responsibility for the remaining crimes covered by the Code, namely, genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes. Subparagraph (a) covered the intentional commission of a crime, while subparagraphs (b) to (f) dealt with conspiracy and complicity, including the failure of a superior to discharge his or her responsibility in the circumstances set out in article 6. Subparagraph (g) dealt with attempts to commit a crime. While the acts described in those subparagraphs generally entailed individual criminal responsibility under the Code only if a crime actually took place, two exceptions to that rule were to be found in subparagraphs (b) and (g), concerning individuals who ordered or attempted to commit a crime.

8. Articles 5 to 7 and 14, dealing with superior orders, command responsibility, official position and defences, concerned other important general principles relating to individual criminal responsibility.

9. Articles 3 and 15 addressed the punishment of individuals who incurred responsibility for crimes covered by the Code. Article 3 laid down the general principle that an individual who was responsible for a crime was liable to punishment commensurate with the character and gravity of the crime. The competent court was entrusted with the task of determining the penalty in a particular case; no form of penalty was precluded. Article 15 ensured that the court would take extenuating circumstances into account in passing sentence in accordance with the general principles of law.

10. The remaining articles in Part I dealt with various procedural and jurisdictional issues. Article 8 set forth the obligation of States parties to take such measures as might be necessary to establish national court jurisdiction over the crimes covered by the Code other than the crime of aggression. That provision was without prejudice to the jurisdiction of an international criminal court. Such a court would have exclusive jurisdiction over the crime of aggression, except in the case of the national courts of the State committing aggression, which would have concurrent jurisdiction. Articles 9 and 10 dealt with the obligation to extradite or prosecute alleged offenders. Those provisions were also without prejudice to a similar obligation with respect to an international criminal court. Article 11, which was drawn mainly from the International Covenant on Civil and Political Rights, set forth the judicial guarantees to which an individual charged with a crime under the Code was entitled. Article 12 dealt with the non bis in idem principle and article 13 with the principle of non-retroactivity.

11. Part II contained definitions of the crimes covered by the Code. Article 16 defined the crime of aggression for the purpose of individual responsibility. It focused exclusively on the role of the individual and did not attempt to define aggression by a State, which was beyond the scope of the Code. Individuals were held to be responsible in their capacity as leaders or organizers, as stipulated in the Charters of the Nürnberg and Tokyo Tribunals. The threshold of involvement of an individual as leader or organizer was defined as actively participating in or ordering the planning, preparation, initiation or waging of aggression committed by a State. That criterion reflected the recognition that aggression was always committed by individuals occupying the highest decision-making positions in the political or military apparatus of a State and/or in its financial and economic sector.

12. Article 17 set forth the definition of the crime of genocide as contained in article II of the Convention on the Prevention and Punishment of the Crime of Genocide.

13. Article 18 defined crimes against humanity in terms of a general criterion followed by a list of specific offences. In order to qualify as crimes against humanity, the prohibited acts must be committed in a systematic manner or on a large scale and be instigated or directed by a Government, organization or group. Thus acts committed by terrorists could qualify as crimes against humanity under that provision. The crime of apartheid was also covered by the article under the more general heading of "institutionalized discrimination" in subparagraph (f).

14. Article 19 set forth the definition of crimes against United Nations and associated personnel as contained in article 9 of the recently adopted Convention on the Safety of United Nations and Associated Personnel. The scope of the provision was limited by its second paragraph, which was drawn from article 2 of the Convention. The additional criteria set out in the chapeau had been added to ensure that the crimes were of sufficient gravity to constitute a threat to international peace and security.

15. The definition of war crimes in article 20 consisted of a general criterion followed by a list of specific offences. A war crime listed in the article would qualify as a crime against the peace and security of mankind only when it was committed in a systematic manner or on a large scale. Subparagraph (a) dealt with grave breaches of the Geneva Conventions of 1949. Subparagraphs (b) and (c) dealt with the grave breaches listed in article 85 of the 1977 Protocol I Additional to the Geneva Conventions of 1949, while subparagraph (d) explicitly reaffirmed the criminal nature of such conduct, which was contrary to the more general prohibitions contained in the 1949 Geneva Conventions. Subparagraph (e) dealt with violations of the laws and customs of war, known as the "Hague Law"; subparagraph (f) dealt with violations of international humanitarian law in non-international armed conflict; and subparagraph (g) dealt with damage to the environment during armed conflict that was so severe that it might be characterized as a crime against the peace and security of mankind.

16. As indicated in paragraphs 47 and 48 of the report, the Commission had considered various forms which the draft Code could take, including an international convention adopted by a plenipotentiary conference or the General

international convention adopted by a plenipotentiary conference or the General Assembly, incorporation of the Code in the statute of an international criminal court, or adoption of the Code as a declaration by the General Assembly. The Commission recommended that the Assembly should select the most appropriate form which would ensure the widest possible acceptance of the draft Code. As noted in paragraph 49 of its report, the Commission had paid a tribute to the Special Rapporteur for his outstanding contribution to the preparation of the draft Code.

17. Mr. HAFNER (Austria) noted that as early as 1947, the General Assembly had requested the Commission to prepare a draft code of offences against the peace and security of mankind based on the Nürnberg and Tokyo Principles. Forty-nine years later, that work had been completed. In its report (A/51/10) the Commission described the setbacks it had experienced owing to the lack of an agreed definition of aggression, but the report also showed that the Commission was not responsible for the long delay in completing its task. The best legal skills and efforts would be unable to produce a particular text if political circumstances precluded an agreement among States on certain basic principles. The Commission's first major success in that area had been the preparation of the draft statute for an international criminal court, which now served as the basis of discussions in the Preparatory Committee on the Establishment of an International Criminal Court. Moreover, the Commission had submitted the complete text of the draft Code of Crimes against the Peace and Security of Mankind to the General Assembly at the current session.

18. The draft Code deserved the wholehearted appreciation of the Sixth Committee, especially in the light of the complexity of the legal issues involved. As to the content of the draft articles, his delegation believed that the time had not yet arrived to take a decision on them. The draft articles addressed the same issues as those which were being discussed in the Preparatory Committee; to discuss them in a different framework, with different participants, would only generate confusion. His delegation nonetheless believed that the draft Code in its current version had benefited from the reduction in the number of crimes.

19. With regard to the various forms the draft Code might take, his delegation did not support any of the alternatives proposed by the Commission in paragraph 47 of its report. Since the outcome of the negotiations on the draft statute for an international criminal court was not yet known, it could not be determined whether the statute's provisions would conform to the Code as currently drafted. Nevertheless, the existence of divergent rules on the same issues would not be conducive to an effective criminal jurisdiction. Similarly, a solution whereby crimes at the national level differed from those at the international level would be undesirable, since neither the principle of complementarity nor that of speciality would be applicable.

20. As to the possible incorporation of the draft Code in the statute of an international criminal court, his delegation saw no need for formal action in that regard, especially in view of the numerous alternative versions of the statute being discussed in the Preparatory Committee. Accordingly, a final decision on the form should be postponed until the draft statute had been finalized.

21. The foregoing comments did not imply that the Commission's work on the draft Code had been a futile exercise; on the contrary, the draft Code constituted a valuable contribution to the negotiations on an international criminal court. Articles 2 to 7, for example, were extremely helpful, since the Preparatory Committee had held only an initial round of discussions on the general principles of criminal law. Articles 2, 5, 6 and 7 in particular dealt with matters that had been insufficiently analysed in the Preparatory Committee but which required deeper scrutiny in the light of the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda.

22. Article 8 of the draft Code contained interesting ideas relating to the issue of complementarity. However, with regard to the Commission's commentary on that article, he wished to note that article VI of the Convention on the Prevention and Punishment of the Crime of Genocide did not restrict jurisdiction over such crimes to the State in whose territory the crime was committed. Although the article imposed a duty to prosecute only upon that State, it did not exclude the right of another State to exercise criminal jurisdiction over such crimes as well.

23. While the Preparatory Committee had not yet embarked upon the definition of crimes, it was already clear that such a definition was one of the most difficult issues to be negotiated; the formulations presented by the Commission therefore constituted a welcome contribution in that regard. While recognizing that not all the crimes defined by the Commission would fall within the jurisdiction of an international criminal court, his delegation supported the inclusion of crimes against United Nations and associated personnel in article 19 of the draft Code.

24. Ms. Wong (New Zealand), Vice-Chairman, took the Chair.

25. Mr. CALERO RODRIGUES (Brazil) said that his delegation supported the reduction in the number of articles and categories of crimes contained in part II of the draft Code of Crimes against the Peace and Security of Mankind, which should embody only those acts that were gross infringements of universally accepted standards of human behaviour. He also welcomed the inclusion of crimes against United Nations and associated personnel, although he felt that the text would be improved by the addition of further elements, such as a definition of the term "United Nations operation".

26. The distinction in the text between the very specific crimes of aggression and genocide, which were referred to in the singular, and crimes against humanity and war crimes, which, being non-specific, were referred to in the plural, was a relevant one. The International Law Commission had also been wise to include in the text of article 18 of the draft Code only those acts which were characterized as crimes in accordance with generally accepted norms of international law. With regard to the form of that article, however, he believed that the initial confusion created by the inclusion of so many subparagraphs would be dispelled if the crimes concerned were presented in a logical order, rather than on the basis of the instruments from which they were derived. The article might start, for example, with acts which affected individuals, followed by acts which affected groups of human beings and concluding with acts which affected property, although it might be necessary to

distinguish between acts committed in armed conflict and those committed in conflicts of an international character.

27. He expressed his delegation's admiration for the drafting of article 16, on the crime of aggression, and then outlined the difficulties that had arisen in defining aggression. In that connection, the draft Code should address only crimes committed by an individual through participation in an aggression committed by a State. Fortunately, such participation was well defined in the text of article 16. In the light of that text, he wondered whether the problem of the inclusion of aggression as a crime falling under the jurisdiction of the proposed international criminal court could be alleviated, if not put to rest. He also believed that the draft Code should include a provision similar to that contained in article 23, paragraph 2, of the draft statute of the proposed court, which adequately addressed the issue of the relationship between the court and the Security Council. The current draft Code was a valuable contribution towards providing the international community with an adequate instrument for penalizing individual conduct which threatened international peace and the security of mankind.

28. As to the action that should now be taken on the draft Code, his delegation believed that the Commission's failure to make any specific recommendations in that connection was motivated by its fundamental conviction, illustrated in article 48 of its report (A/51/10), that the draft Code should become a legal instrument which enjoyed wide acceptance among States. The Commission therefore assumed that the General Assembly was in the best position to decide the most suitable means of achieving that objective. Of the three possible options, adoption of the draft Code by a General Assembly resolution would not necessarily give it binding legal force, which was an essential consideration. Neither would the inclusion of the draft Code in the statute of an international criminal court provide a complete solution, as its provisions should be applicable by national courts as well as by the international criminal court, and the former, by definition, could not be bound by the statute of the latter.

29. It was only through the third option of embodying the draft Code in an international treaty that the Code would acquire the necessary binding power and become an efficacious instrument. His delegation favoured that option, despite the risk that it would not automatically lead to the ultimate goal of universality. It also believed that consideration should be given to the early incorporation of the provisions of the draft Code in the draft statute of the international criminal court, a possibility which the Preparatory Committee on the Establishment of an International Criminal Court should be invited to examine.

30. Mr. PERRIN DE ROCHAMBAUT (France) said that his delegation shared the concern that the notion of crimes against the peace and security of mankind should not be devalued and therefore welcomed the reduction in the number of crimes contained in the draft Code. Article 16, however, failed to make any reference to the relevant provisions of the Charter of the United Nations concerning the essential role of the Security Council in determining aggression, thus giving rise to the possibility that judicial authorities might differ with the Council in regarding a particular crime against the peace and security of mankind as constituting aggression. For that reason, article 16 was difficult

to accept, whereas article 17 posed no specific problems. Article 18, on the other hand, should state that crimes against humanity referred exclusively to crimes which were deliberately targeted at civilians.

31. Article 20 also posed difficulties for his delegation, which had consistently maintained that only the most serious war crimes should continue to be included among crimes against the peace and security of mankind, provided that they were carefully defined - along the lines of the four Geneva Conventions of 1949, for instance. Conversely, his delegation was opposed to the inclusion of any reference to certain provisions of Protocol I Additional to those Conventions or to protection of the environment in times of armed conflict. In the case of offences considered as war crimes, it would be preferable to adhere to the Statute of the International Criminal Tribunal for the former Yugoslavia.

32. His delegation continued to question as misplaced the inclusion of crimes against United Nations and associated personnel, their seriousness notwithstanding. It also regretted that the efforts to achieve a conceptual definition of crimes against the peace and security of mankind had been abandoned.

33. In conclusion, he wished to commend and encourage the more realistic approach adopted by the Commission in its treatment of the topic. The draft Code could serve as a useful guide for the Preparatory Committee on the Establishment of an International Criminal Court, although there should be no functional links between the two drafts texts.

34. Mr. NAGAMINE (Japan) said that his delegation heartily welcomed the adoption of the draft Code of Crimes against the Peace and Security of Mankind and believed that war crimes and other acts against humanity must be banned once and for all in the interests of international peace and security. The timely adoption of the draft Code responded to such a need within the international community. His delegation was also gratified that the members of the Commission had responded to the need to ensure the widest possible acceptance of the draft Code by limiting the crimes within its scope. The fact that, under article 20, subparagraph (g), long-term and severe damage to the natural environment was established as a war crime enhanced the credibility of the draft Code by ensuring its consistency with current international law. The inclusion of crimes against United Nations and associated personnel likewise ensured its consistency with the view that such attacks posed a direct threat to international peace and security. Having ratified the 1994 Convention on the Safety of United Nations and Associated Personnel, his Government was gratified that such crimes were included within the scope of the draft Code.

35. The draft Code and the draft statute of the international criminal court should be consistent wherever they overlapped, failing which the former would not be assured of gaining wide acceptance. The establishment of an international criminal court could be equally affected by a lack of consistency. The draft Code should be adopted as a treaty, as it had elements in common with other international conventions. In order to avoid duplication and maintain consistency, however, consideration might be given to integrating parts of the draft Code into the draft statute, or, alternatively, adopting the draft Code in

the form of a General Assembly declaration. The decision lay with the Sixth Committee.

36. Mr. AL-BAHARNA (Bahrain) said that the adoption by the International Law Commission of a draft Code covering only five categories of the most serious international crimes should not in any way affect the international character of other equally grave crimes. He recalled the process whereby the number of categories had been reduced over the years from 12 as well as the reasons for the most recent decision, which were given in the introduction to chapter II of the Commission's report (A/51/10). The Commission had noted in particular that the inclusion of certain crimes did not affect the status of other crimes under international law.

37. His delegation had always been in favour of including the original 12 categories of crimes but would accept the present reduced list in order to secure wider acceptance by Governments of the draft Code, which certainly covered the acts considered by the international community to be the "crimes of crimes".

38. It was regrettable that in an instrument of such importance the Commission had been unable to decide on the form the draft Code should take. The General Assembly itself would have to decide whether it should be a binding instrument or a mere declaration. His delegation believed that it should take the form of a convention or a multilateral treaty adopted either by the General Assembly or by a conference of plenipotentiaries. In view of the financial implications the first choice might be more convenient. In any event, in order to ensure prosecution of the crimes in question, the draft code must become a legally binding criminal code, with a machinery for its implementation. It would seem therefore that, if the General Assembly established a permanent criminal court, its statute should contain a provision for the application of the draft Code. Accordingly it would be appropriate for the Preparatory Committee on the Establishment of an International Criminal Court to consider the question of the draft Code. The two topics were clearly linked, since they addressed similar issues and similar crimes. Furthermore, as currently worded the court's draft statute could be amended to include the crimes covered by the draft Code.

39. The Commission had had that connection in mind at its forty-sixth session when it had pointed to the need for harmonization of the draft Code and the draft statute in order to avoid contradiction between the articles common to the two texts, and it had subsequently approved the recommendations of its Drafting Committee in that connection. The draft Code had been restricted to the "crimes of crimes" and, like the draft statute, it now focused exclusively on crimes committed by individuals.

40. However, members of the Commission had argued that if the draft Code was to be implemented by the international criminal court, it would have to state specific penalties for each crime, in accordance with the principle of nulla poena sine lege. But other members and the Special Rapporteur had pointed out that the criterion of extreme gravity was a sufficient definition for the crimes against the peace and security of mankind. As a result, article 3 (Punishment) was formulated in general terms but did not rule out the application of any form of penalty by the competent court implementing the Code. It had been pointed

out, for example, that the Nürnberg trials had found that crimes against peace were crimes under customary law, although such law made no provision for penalties. The Commission appeared to have accepted that position.

41. With regard to the first three articles of the draft Code, he had previously stated his delegation's position in favour of a text which provided a comprehensive definition of the concept of a crime against the peace and security of mankind and specified the punishments, including maximum penalties, in accordance with the principle of nulla poena sine lege. However, having now considered the text adopted in second reading and the commentaries thereto, as well as the arguments of the members of the Commission, he was inclined to set aside his previous reservations and support the Commission's conclusions on the three articles.

42. The Commission had had great difficulty in agreeing on a definition of the crime of aggression (article 16). The definition adopted in first reading had been almost the same as the one contained in General Assembly resolution 3314 (XXIX), but it had been subjected to much criticism by Governments. The Commission had now adopted a shorter version of the definition. The first consideration underlying the present text was that, in a code dealing only with individual responsibility, the crime of aggression could be committed only by individuals. Since the responsibility of individuals was clearly distinguished from the responsibility of the State committing the aggression, there was no need to provide a definition of aggression by a State. But the present text provided that an individual could be guilty of the crime of aggression only if aggression had been committed by a State. It was thus a characteristic of the crime of aggression that there was always a relationship between the crime committed by an individual and the actual commission of aggression by a State. The second consideration was that the definition contained in resolution 3314 (XXIX) had not been intended as a legal text for use in a criminal code because it was considered "unsatisfactory" for the purpose of determining the criminal responsibility of an individual.

43. The definition of the crime of genocide contained in article 17 included the two basic elements of requisite intent (mens rea) and the prohibited act (actus reus). The text had in fact been taken from article II of the Genocide Convention which, as the commentary to article 17 noted, was generally recognized as the authoritative definition of the crime of genocide. His delegation supported the Commission's position on the inclusion of the crime and on its definition.

44. The main innovation in article 18, as its new title "crimes against humanity" indicated, was that all the acts listed in the article were considered to be crimes and not just violations of human rights. The article had been generally welcomed, although the Special Rapporteur's proposed deletion of the element of "systematic or massive violation" from the definition had given rise to disagreement in the Commission. His delegation agreed in general with the definition of crimes against humanity; however, it thought that "wilful killing" might be more suitable than "murder" because of the seriousness and massive nature of the crimes in question. It was moreover glad that its suggestion that the crime of torture should be included without any examples had been acted upon. The Commission had also accepted his delegation's request that

"reduction to slavery" should be replaced by "enslavement" and that the crime of persecution should be qualified by the phrase "on physical, racial, religious or ethnic grounds". It had also been a good move to replace the former article on apartheid with subparagraph (f), on institutionalized discrimination.

45. Article 19, covering a fifth crime now added to the four major crimes, was based on the Convention on the Safety of United Nations and Associated Personnel, adopted by the General Assembly in 1994. In its commentary to the article, the Commission stated that it had decided to include that category of crimes in the Code because they were of concern to the international community as a whole, being committed against persons who represented it and risked their lives to protect its fundamental interest in maintaining the international peace and security of mankind. Some members of the Commission had objected to the inclusion of article 19 on the grounds that far more serious crimes had intentionally been excluded from the Code. Nevertheless, his delegation had no hesitation in supporting the Commission's decision to include it.

46. On draft article 20, he recalled that in its statement to the Sixth Committee the previous year, his delegation had favoured replacing the expression "in violation of international humanitarian law", used in subparagraphs (a), (b), (c), (d) and (f), with the expression "grave breaches of the 1949 Geneva Conventions". However, it was now more inclined to accept the wording of the article as adopted because of its wider conceptual scope and application. As for subparagraph (e), the phrase "in violation of the laws or customs of war" could perhaps be qualified by the word "serious"; however, that subparagraph took the form of an exhaustive list. In subparagraph (g), the addition of the phrase "long-term and severe damage to the natural environment" and of the proviso that "such damage occurs" was to be welcomed. Although the cumbersome drafting of the article adopted on first reading had not been entirely eliminated in the new version, his delegation supported article 20.

47. Mr. Escovar-Salom (Venezuela) resumed the Chair.

48. Mr. LAVALLE VALDÉS (Guatemala) said that, but for an extrinsic circumstance, the Sixth Committee's consideration of the draft Code of Crimes against the Peace and Security of Mankind would have been confined to the tasks of studying its provisions with a view to adopting it and deciding whether the text should take the form of a declaration by the General Assembly or a multilateral treaty open for universal signature. The fact was, however, that the draft Code did not exist in isolation; it was closely interrelated with the draft statute for an international criminal court. The two texts covered much of the same ground and often complemented one another.

49. The two texts were complementary in that some provisions of the draft Code filled serious gaps in the draft statute, by establishing, in articles 2, 5, 6, 7, 14 and 15, general principles of criminal law. Other lacunae in the draft statute that could be filled, at least partially, by provisions of the draft Code were those relating to the definition and characterization of the crimes covered by the statute, which largely coincided with those covered by the Code in articles 17 to 20.

50. Conversely, articles 8, 9 and 12 of the draft Code referred to an international criminal court, and were therefore complemented by the draft statute. Furthermore, the draft statute seemed destined to take the form of a treaty establishing the Court, whereas it remained unclear whether the draft Code would ultimately take the form of a multilateral treaty or a declaration.

51. Given the extent to which the two draft texts overlapped, his delegation had serious doubts as to the desirability of transforming the draft Code into either a declaration or a convention separate from the convention establishing the international court. Furthermore, if the General Assembly should transform the draft Code into a declaration or a treaty before the conference to adopt the statute of the court had completed its work, that would be tantamount to interference in the work of the conference. Consequently, without in any way seeking to belittle the draft Code, his delegation recommended that at the present session the General Assembly, rather than losing time in a lengthy consideration of its provisions, should request the Preparatory Committee on the Establishment of an International Criminal Court to take due account of the Code in the performance of its mandate.

52. Mr. CAFLISCH (Observer for Switzerland) said it was a propitious coincidence that the Commission had completed its work on the draft Code just as the Preparatory Committee was about to embark on the task of defining the crimes falling within the jurisdiction of an international criminal court, determining the question of complementarity, formulating general criminal provisions and elaborating the court's rules of procedure. All those points were covered by the Code, which should therefore be transmitted by the General Assembly to the Preparatory Committee for utilization in the drafting of the statute of the court. That did not mean that the Preparatory Committee should necessarily and invariably be bound to follow the Code, but the existence of the latter should expedite the deliberations of the former, thereby enabling a diplomatic conference to be convened in the near future.

53. However, the purpose of the draft Code was not solely to contribute to the establishment of the court. The Code must also have the independent function of dictating or suggesting to States not parties to the Statute guidelines for conduct where crimes against the peace and security of mankind were concerned. The idea that individuals could be guilty of international crimes which all States were under an obligation to punish must become firmly rooted in States' consciousness. Accordingly, the General Assembly must not confine itself to transmitting the draft Code to the Preparatory Committee, but should also take note thereof.

54. Of the crimes enumerated in articles 16 to 20 of the draft Code, the most controversial category was undoubtedly crimes of aggression committed by individuals. To begin with, the very nature of the crime was open to question: in his delegation's view, aggression was a State crime rather than a crime of an individual. If that was not the case, as was implied by the text prepared by the Commission, it was doubtful whether the act characterized as a crime, as defined in article 16, reflected the current state of customary law. Admittedly, article 6 (a) of the Nürnberg Charter and article 5 (a) of the Tokyo Charter referred to crimes against peace and, thus, to aggression. Unlike article 16 of the Code, however, those provisions referred to the planning,

preparation, launching or conduct of a war of aggression, and not simply to the much broader concept of "aggression". Lastly, the concept of aggression as a crime of an individual raised a problem that was resolved neither by article 16 nor by the commentary thereto. No doubt it was for the competent international or national court to decide whether a crime of aggression had been committed by an individual, but it remained to be ascertained whether that decision could be taken freely - which, in the case of national courts, might lead to abuses - or whether it could and must be taken only if the act of aggression by the State linked to the individual crime had previously been determined by the Security Council.

55. Broadly speaking, his delegation endorsed the principles of international criminal law set forth in articles 5 to 7 and 11 to 15 of the draft Code. However, it wished to make two comments on those provisions. First, it attached great importance to the non bis in idem principle, and would have wished to see circumstances in which a national court was empowered to reopen cases already tried by a court of another State limited more rigorously than they were under article 12, paragraph 2 (b). Secondly, his delegation considered that it was not enough, in articles 14 and 15 to refer laconically to "the general principles of law": the rule of nullum crimen, nulla poena sine lege required that those principles should be explicitly spelt out.

56. Article 2, paragraph 3 (f), referred to an individual "directly and publicly" inciting another individual to commit an international crime. While it was clear why the incitement must be "direct", it was less easy to see why it must be "public" in order for it to be punishable. His delegation had serious doubts as to the validity of the explanation contained in paragraph (16) of the commentary, according to which private incitement to commit a crime would be covered by the concept of participation set forth in subparagraph (e).

57. Article 10, paragraph 2, provided that the Code could serve as the legal basis for extradition by one State party to another State party with which the former had no extradition treaty. It added that, in such cases, extradition "shall be subject to the conditions provided in the law of the requested State". That was undoubtedly true: if the requested State wished to use the Code as the basis for extradition, that was entirely its own affair. It thus had no need for the authorization provided for in article 10, paragraph 2; that provision might even be regarded as an incitement to States to disregard their own law. In his delegation's view, article 10, paragraph 2, should not have been included in the Code.

58. In spite of those comments, some of them critical, his delegation's overall impression of the draft Code was nevertheless favourable.

VISIT BY THE PRESIDENT, JUDGES AND REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

59. The CHAIRMAN welcomed to the Committee the President of the International Court of Justice, Mr. Mohammed Bedjaoui, two judges of the Court, Mr. Luigi Ferrari Bravo and Mr. Abdul G. Koroma, and the Registrar of the Court, Mr. Eduardo Valencia Ospina. He then invited the President of the Court to address the Committee.

60. Mr. BEDJAOUI (President of the International Court of Justice) said that the recent revival of interest in the International Court of Justice, after a period of neglect, was continuing, as could be seen from the entry in its General List of a new case by Botswana and Namibia. That case had been referred to the Court by notification to the Registry of a special agreement, a method that typified the flexibility of the Court. However, the notification of a special agreement was not the only way in which a State could declare its acceptance of the Court's compulsory jurisdiction; a State could also avail itself of the forum prorogatum, an extremely flexible, though underused, instrument which also offered firm guarantees for the sovereignty of States. It offered access to the Court to all those States still hesitant about accepting the Court's compulsory jurisdiction by the more formal means of a declaration made in accordance with Article 36, paragraph 2, of the Statute of the Court, a compromissory clause in a treaty or a special agreement.

61. The forum prorogatum was an ancient institution by virtue of which the parties to a dispute agreed to an extension of a court's ordinary jurisdiction to cover certain aspects of their dispute which would not normally fall within that jurisdiction. In effect, it was an affirmation that jurisdiction was based on the will of the parties. The Permanent Court of International Justice, and subsequently the International Court of Justice, had adapted the forum prorogatum in such a way as to take account of the specificities of the international legal order while opening the way to the international judicial settlement of disputes and respecting the sovereign will of the parties. By reason of the non-binding character of the jurisdiction of the Court, the forum prorogatum possessed a broader content in the international legal order than it did in the internal legal order. Judges in The Hague had suggested that it could serve as a basis, in the absence of any other, for its jurisdiction in respect of disputes which would otherwise not fall within that jurisdiction. In other words, if a State filed in the Registry of the Court an application instituting proceedings against a State which had not accepted the Court's compulsory jurisdiction, that application could be interpreted as an offer of judicial settlement that the respondent State was free to accept or reject. If the State accepted, the Court would find that it had jurisdiction to deal with the dispute. Therefore, in the context of the International Court of Justice, the forum prorogatum did not so much designate an extension of the Court's jurisdiction as it did the retroactive establishment of that jurisdiction.

62. He wished to emphasize that that original way of establishing jurisdiction was quite in conformity with the Charter of the United Nations, the Statute of the Court and the Rules of the Court. For example, Article 36, paragraph 1, of the Statute of the Court stated that the jurisdiction of the Court comprised all cases which the parties referred to it. Article 40 of the Statute provided another important illustration of the openness of the Court, stipulating that, although the Court could only become seized of a matter if a special agreement or application was addressed to the Registrar and the subject of the dispute and the parties were indicated, there was no requirement for the applicant State to refer to the provision on which it claimed to found jurisdiction of the Court.

63. The term "forum prorogatum" had been used for the first time by the Permanent Court of International Justice in 1934, when Article 35 of the Rules of Court, concerning the references to be included in an application instituting

proceedings, was being revised. Reference by the applicant State to the basis of the Court's jurisdiction remained optional, and subsequent Rules continued to avoid making such a reference obligatory.

64. In its first judgment, in the Corfu Channel case in 1948, the International Court of Justice had acknowledged, albeit implicitly, that a case could be brought before it not only by the notification of a special agreement or an application based on the compulsory jurisdiction of the Court, but also by an application not based on such compulsory jurisdiction. The Court had specified that there was nothing to prevent "the acceptance of jurisdiction ... from being effected by two separate and successive acts, instead of jointly and beforehand by a special agreement". That did not mean that, in seeking to facilitate the applicant State's access to the Court, the interests of the other State were not protected. Indeed, since the revision of the Rules of Court in 1978, special precautions had been taken to do just that. Article 38, paragraph 5, provided that, in a case where the applicant State's intention was to found the jurisdiction of the Court upon consent not yet given by the State against which the application was made, the application was transmitted solely to that State, thereby forestalling any undue political exploitation of the case or untimely publicity. The same Article stated that, as long as consent had not been given, the application could not be entered in the General List and no action could be taken unless the respondent State consented to the Court's jurisdiction for the purposes of the case.

65. The institution of the forum prorogatum in no way called into question the well-established principle of the consent of a State to the jurisdiction of the Court. The manner in which a State gave its consent was relatively unimportant, but once consent had been given, it could not be withdrawn.

66. One of the cardinal principles of the international judicial settlement of disputes was consensualism, a corollary of the sovereign equality of States. Thus the Permanent Court, in its second judgment, had emphasized the importance of consensualism as the only basis of its jurisdiction. Before the aforementioned revision in 1978 of the Rules of Court by the International Court of Justice, applications in which it was recognized that the State against which those instruments had been invoked had not accepted the jurisdiction of the Court had been entered in the General List. The Court had then been obliged to order the entries removed from the General List, as its jurisdiction was not accepted by the State concerned. The consent of the State remained a sine qua non of the Court's jurisdiction; however, the form of that consent and the time at which it was given were of secondary importance. The forum prorogatum removed the formalities from the process of giving such consent.

67. The principle that unequivocal consent was essential, but that it did not need to be expressed in any particular form, had been upheld in various judgments of the Permanent Court of International Justice, as in the Rights of Minorities in Upper Silesia case, and of the International Court of Justice, as in the Corfu Channel case. In the Mavrommatis Palestine Concessions case, the Permanent Court, while recognizing that its jurisdiction could not extend to acts not covered by article 2 of the Mandate for Palestine, had recognized the adequacy, for the purposes of establishing its jurisdiction, of the declaration by the respondent State that it accepted the decision of the Court on a question

which, in the view of the Court, did not otherwise fall within its jurisdiction. In the case of Rights of Minorities in Upper Silesia, the Permanent Court had ruled that the submission of arguments on the merits, when no reservations were expressed with regard to the question of jurisdiction, had to be regarded as an unequivocal indication of the State's desire to obtain a decision on the merits of the suit.

68. The International Court of Justice had also had occasion to rule on the existence of the express or implicit consent of the respondent State to its jurisdiction, most recently in its Judgment of 11 July 1996, in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia). Nevertheless, while the Court was exceedingly careful in its investigations to determine the will of the parties without being excessively formal in that respect, it was also very firm in its interpretation of the legal effects of such consent. It had on several occasions ruled that, once freely expressed, consent to its jurisdiction could no longer be revoked by the respondent State. The irrevocability of consent was another important characteristic of the forum prorogatum, in accordance with the principle of non-contradiction. If a State did not respect its undertakings, it was internationally responsible with respect to the State in which it had fostered an erroneous conviction. That principle had been upheld by both the Permanent Court of International Justice and the International Court of Justice on various occasions. Thus, they had fashioned an original and flexible jurisdictional instrument, the forum prorogatum, using the only material at their disposal, namely, the principle of the consent of the parties to their jurisdiction.

69. It was only in 1952, however, in the Anglo-Iranian Oil Co. case, that the International Court of Justice first defined the principle of forum prorogatum, highlighting the requirement of consent. The Court had subsequently confirmed its case-law on the topic, not only in contentious proceedings, such as the Barcelona Traction case, but also in advisory proceedings, such as the South West Africa case. In the latter case, the Court had observed that South Africa had given its consent by participating in the proceedings and addressing the merits.

70. While he sought to encourage States to use the Court in The Hague, or to use it more often, he also wished to avoid two pitfalls: one was the submission of artificial cases to the Court, or exploitation of the Court for political purposes, and the other was the abandonment by States of the traditional methods of recognizing the Court's jurisdiction in accordance with Article 36 of its Statute. The forum prorogatum, as a manifestation of the sovereign will of the parties, was just one of the many ways to express consent to the jurisdiction of the Court. Its principal advantage was its flexibility, in that it allowed States to consent to its jurisdiction after a dispute had arisen. Its weakness was that it did not offer predictability on the question of the jurisdiction of the Court. He therefore invited delegations to regard the forum prorogatum as a useful complement to, but not a substitute for, the other, more formal methods of accepting the jurisdiction of the Court.

The meeting rose at 1.05 p.m.

UNITED NATIONS

General Assembly

FIFTY-FIRST SESSION

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32nd meeting
held on
Tuesday, 5 November 1996
at 10 a.m.
New York

SUMMARY RECORD OF THE 32nd MEETING

Chairman: Mr. ESCOVAR-SALOM (Venezuela)

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The meeting was called to order at 10.05 a.m.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued)

1. Mr. BOS (Netherlands) said that the proposal by the International Law Commission to limit the scope of the draft Code of Crimes against the Peace and Security of Mankind to a carefully selected group of serious crimes was a welcome improvement on the draft given a first reading in 1991. A similar desire to limit the scope could be seen in the statutes of the two ad hoc tribunals and in the discussions in the General Assembly and the committees on the establishment of an international criminal court, which showed that States were only willing to give up part of their sovereignty, and only when the crimes were extremely serious and shocked the conscience of mankind.

2. The Commission had sought to further limit the scope of the draft Code by including the qualification "in a systematic manner or on a large scale" in articles 19 and 20. That qualifier had been added in recognition of the fact that crimes against the peace and security of mankind constituted the most serious international offences. It remained to be seen whether the qualifier could be used by the Preparatory Committee on the establishment of an International Criminal Court in relation to other crimes.

3. His delegation was in favour of the fairly general way in which the draft Code approached issues such as defence, judicial guarantees and sentences, as such details were perhaps better left for further elaboration by either the States concerned or by the court.

4. Of the three possible forms which the draft Code might take, his delegation preferred its incorporation in the statute of an international criminal court, since history showed that the question of international criminal offences for which individuals bore criminal responsibility under international law was closely linked to the question of the international adjudication of such crimes. For example, the Commission had had to stop its work on both a draft code and a draft statute for an international criminal court in 1954 because agreement could not be reached on the definition of aggression. Moreover, one of the major issues in the discussions on an international criminal court was the selection and definition of crimes. All the issues dealt with in the draft Code, such as individual criminal responsibility, punishment and the principle of universality, were also the subject of intense discussion in the Preparatory Committee, indicating that the specific mandates relating to the draft Code and the international criminal court were converging. Given that overlap, his delegation believed that the most efficient way to deal with those interrelated questions was to choose one body, preferably the Preparatory Committee, to discuss the issues relating to the establishment of an international criminal court, including those touched upon in the draft Code. The draft Code was a major step forward in the international community's efforts to enforce criminal liability for violations of international humanitarian law.

5. Mr. MIKULKA (Czech Republic) said that the International Law Commission's decision to limit the scope of the draft Code to crimes which posed an undeniable threat to the peace and security of mankind would improve the Code's prospects of adoption. His delegation shared the view of the Commission that limiting the scope of the draft Code to the most serious crimes did not imply any doubts as to the criminal nature of other individual crimes under international law, nor did it prejudge the future development of the law in that area.

6. The draft Code established two main principles, the principle of individual responsibility for crimes of an international nature and the principle of the direct applicability of international law to the perpetrators of such crimes, in line with modern trends in international law. His delegation was pleased with the way in which individual criminal responsibility was linked to State responsibility in the draft; as the Commission had pointed out in its commentary on article 4, the punishment of individuals guilty of crimes against the peace and security of mankind did not exempt the State from its responsibility for internationally unlawful acts.

7. Article 1, paragraph 2, made clear that international law took precedence over national law when the two were in disagreement, even for the purposes of nullum crimen, nulla poena sine lege. At the same time, it did not rule out the active role of national law, when it was in accordance with international law, in the prosecution of individuals suspected of a crime under international law.

8. Whereas part I dealt with general principles, part II defined the various crimes against the peace and security of mankind and presented the substantive law that would be applied in practice. With regard to the crime of aggression, his delegation agreed with the solution in article 8 whereby jurisdiction over that crime was vested in an international criminal court. The thorny problem of defining aggression had been cleverly solved by having the Code deal with individual responsibility rather than with the definition of what constituted an unlawful act committed by a State. The Code also recognized that, for responsibility to be attributed to an individual, that individual had to be participating in a State activity at a decision-making level. It thereby limited responsibility for a crime of aggression to leaders or organizers, while extensively listing the activities which would render individuals responsible for that crime.

9. The need to determine that an act of aggression had been committed by a State, which could only be done by the Security Council, before an individual could be held responsible for an act of aggression raised several problems. For example, it might well prove difficult to ensure that the decisions of the Council were consistent with those of the judicial body called upon to implement the provisions of the Code. He wondered whether an international court would be able to prosecute an individual if the Security Council had not determined the existence of an act of aggression. Such problems were not addressed in the draft Code, but would need to be solved if the Code was to work in practice.

10. With regard to the crime of genocide, his delegation welcomed the inclusion in article 17 of article II of the Convention on the Prevention and Punishment of the Crime of Genocide, a definition also used in the statutes of the

tribunals established for the former Yugoslavia and Rwanda. His delegation also welcomed the inclusion of crimes against humanity, in article 18, in place of the notion of systematic and massive violations of human rights. Crimes against humanity were distinguished from isolated criminal acts by their scale, the systematic manner in which they were carried out and the fact that they were instigated by a Government, organization or group. Article 18 incorporated all the developments in the concept of crimes against humanity since it had been established in the Nürnberg Charter. He also welcomed the decision to retain the expression "war crimes" and the wording already used in many existing instruments. The advantage of having the provisions of the Code harmonized with those of other instruments far outweighed the disadvantage of the lack of consistent terminology within the article.

11. His delegation had some doubts about the inclusion of crimes against United Nations and associated personnel, despite the laudable aims behind that decision. As such crimes were not included in existing law, they could only be punished by means of a treaty obligation between the States concerned, which would have to be borne in mind when the form of the Code was decided upon.

12. His delegation welcomed the Commission's decision not to retain certain crimes as separate crimes, but to include some aspects of those crimes in the provisions of articles dealing with crimes against humanity and war crimes. With regard to punishment, the Commission had correctly formulated the only principle which could be deduced from customary law, namely, that the punishment should reflect the nature and seriousness of the crime. The Commission had also correctly left the scale of penalties to be determined by the statute of an international court or by national law.

13. Although the Commission had left open the question of the form the draft Code would eventually take, certain provisions in the Code seemed to have been drafted with its adoption in the form of a convention in mind. However the incorporation of the Code in the statute of an international criminal court merited serious consideration; such a statute would take the form of a convention. Meanwhile, his delegation would welcome a declaration by the General Assembly as a first step on the road to adoption and shared the Commission's concern that the Code should be accepted as widely as possible.

14. In the current international climate, the time was right for the codification of the substantive law in the area of international criminal justice as well as the establishment of an international criminal court. He hoped that the spirit of compromise which had prevailed within the International Law Commission would encourage Member States to be sufficiently open-minded to make the code a reality in the very near future.

15. Mr. CROOK (United States of America) noted with satisfaction that in preparing the current version of the draft Code, the Commission had sought to address many legitimate and deeply held concerns of Governments, including his own. The Commission had wisely decided to limit the scope of the draft Code to a core group of serious offences while excluding international terrorism, illicit drug trafficking and "environmental crimes". His delegation further appreciated the clarification by the Commission of the mental states required

for the commission of crimes and the definitions of key terms or concepts set forth in the commentaries.

16. With regard to article 16, on aggression, his delegation had previously expressed its concern about the definition of aggression. In its earlier work, the Commission had drawn on General Assembly resolution 3314 (XXIX) and Article 2, paragraph 4, of the Charter of the United Nations in seeking to define that term. Those provisions did not constitute an adequate basis for a criminal-law definition, nor did they properly reflect the historical roots of the crime of waging aggressive war, which lay in the aftermath of the Second World War.

17. In its current text, the Commission appropriately recognized that the draft Code was concerned with the conduct of individuals, not States. His delegation appreciated that approach; nevertheless, the concept of aggression remained difficult to define. For that reason, his delegation had urged that the crime of aggression should not be included within the jurisdiction of an international criminal court at the current stage.

18. While the text of article 18 (Crimes against humanity) was generally acceptable, some areas warranted further study. For example, it was necessary to consider whether the Commission's requirement that a prohibited act should be "instigated or directed by a Government or by any organization or group" might be overly broad or vague. Moreover, his delegation was not persuaded that enforced or involuntary disappearance constituted a matter for universal and international criminal jurisdiction. The criminal conduct involved should at least be defined more precisely.

19. His Government was satisfied with the inclusion in the draft Code of crimes against United Nations and associated personnel, although it believed that some of the key terms used in the article could be defined more precisely.

20. Lastly, in the chapeau of article 20 (War crimes), the Commission had sought to draw a distinction between those war crimes which were to be left to national jurisdiction and those which were of such magnitude as to constitute crimes against the peace and security of mankind. His delegation, however, questioned the adequacy of the formula proposed for making that distinction. In addition, the Code appeared to draw in several instances on the provisions of Protocols I and II Additional to the 1949 Geneva Conventions. Neither of those instruments, nor the concepts drawn from them, were universally accepted. It was necessary to examine closely ~~the~~ extent to which the provisions of article 20 were based on conventional or customary law. His delegation doubted, for example, that the provision on damage to the natural environment should be included in the draft Code.

21. His delegation wished to emphasize once again the need for all Governments to have a further opportunity to study the draft Code and to consider its implications for the ongoing negotiations concerning the establishment of an international criminal court. The best course of action would be for the Committee and the General Assembly to transmit the draft Code to Governments for their review and comment, with a view to determining what further steps might be appropriate.

22. Mr. CHEN Shiqiu (China) said that the draft Code had been formulated on the basis of international practice since the end of the Second World War and the relevant international legal instruments. The overall legislative approach thus reflected the main trends of the criminal law legislation of the international community. However, the text had some serious problems which, if left unsolved, would have a serious impact on its universal acceptance.

23. It was appropriate to include in the draft Code the widely accepted principle of non bis in idem, but the exceptions to the principle provided in article 12 did not reflect its true implications and would inevitably give rise to controversies. For example, the problem with paragraph 2 (a) was that if the international criminal court could pass judgement on the appropriateness of a judgement by a national court, then it was acting as a court of review when it retried a case. That was one of the more controversial issues in the deliberations on the draft statute for an international criminal court; almost all States preferred that the future court should have no review jurisdiction. The Chinese Government believed that an international criminal court should act only as a complement to national courts, with no right to review judgements of national courts or to retry cases already tried by them.

24. With regard to paragraph 2 (b), it was true that the criminal legislation of some States provided that their courts had the right to retry cases tried by foreign courts, but that provision embodied the principle of the independent judicial sovereignty of States, which the provisions of the paragraph might impair. The principle of aut dedere aut judicare already provided some legal basis for according priority in the exercise of jurisdiction to States in whose territory a criminal act took place and to injured States. Furthermore, international law should not establish an obligation for a State to accept the retrial by the courts of another State of a case tried by its own courts.

25. His delegation understood the intention of the inclusion, in article 19, of crimes against United Nations and associated personnel, but it doubted whether the content of the crime justified its inclusion. Although they were becoming more serious, such crimes could not really be regarded as serious crimes against the peace and security of mankind, and their inclusion rendered incomprehensible the exclusion of such relatively serious crimes as international terrorism and drug trafficking. They also lacked a legal basis, since the Convention on the Safety of United Nations and Associated Personnel had not yet entered into force. Furthermore, the text of article 19 did not contain precise definitions of its main terms. The article should therefore be deleted.

26. The draft Code and the draft statute of an international criminal court were closely related, but there were inconsistencies between the provisions of the draft Code and the views of most of the States which had participated in the Preparatory Committee. For example, most States were against the inclusion of the crime of aggression in the jurisdiction ratione materiae of the court on the ground that in the absence of a widely accepted definition of aggression such inclusion was inconsistent with the principle of nullum crimen sine lege. An effort must be made to harmonize the two texts.

27. His delegation's concerns were shared by many other delegations and should be given full attention in the future deliberations. Only if solutions

acceptable to all States were found would the first international instrument on criminal justice come into being.

28. Mr. de SARAM (Sri Lanka) said that the provisions of the draft Code were generally acceptable to his delegation. The subject of such a code had in recent years become one of considerable importance to the international community while at the same time a subject of considerable difficulty, as it touched on some of the most sensitive aspects of relations between States and the relationship between United Nations organs. The Commission's approach to the formulation of the draft Code, with which his delegation concurred, appeared to have been as follows: to set forth those general principles that could, at the current stage of development of international criminal law, be deemed to govern individual criminal responsibility; to identify and define those particular crimes which, owing to their magnitude, would be most likely to elicit the broadest possible consensus; and to make possible, through adequate and precise characterization of such crimes, the institution of criminal proceedings, either on the basis of universal national jurisdiction or, where necessary, through an international accord, against the individuals responsible.

29. It should be noted, however, that, such a code could not be viewed as either all-encompassing or fixed for all time. It should be made clear in the text of the instrument establishing the draft Code that the Code's substantive scope might be enlarged in years to come as further possibilities for a clear consensus emerged.

30. While the draft Code should, on the whole, constitute a codification of existing law, it was doubtful whether every provision of the draft Code needed to be based on existing law. It was not easy to distinguish between codification and the progressive development of international law, and difficulties could arise if the drafting of the proposed instrument departed from generally accepted multilateral treaties. Nevertheless, his delegation believed strongly that, when the draft Code touched on questions relating to the Geneva Conventions and Protocols Additional thereto, its provisions must be closely examined by persons with the necessary expertise.

31. As to the question of including the crime of aggression, his delegation shared the view expressed by the representative of Brazil that the provisions put forward by the Commission had been carefully drafted and deserved close consideration.

32. While some delegations had expressed doubts concerning article 19 (Crimes against United Nations and associated personnel), his delegation believed that the article should be included, since those who risked their lives in remote places on behalf of the Organization deserved to be protected.

33. Article 20 (War crimes) required further scrutiny, as it concerned not only international armed conflict, but also armed conflict not of an international character; the term "war" did not cover both cases.

34. Lastly, on the question of the relationship between the Commission's work on the draft Code and the work of the Preparatory Committee for the Establishment of an International Criminal Court, his delegation again agreed

with the Brazilian delegation that for the Sixth Committee simply to refer the recommendations contained in the Commission's report (A/51/10) to the Preparatory Committee would be overly limiting. It would be preferable to make every effort to ensure that the draft Code, after due consideration by Governments, was incorporated into a multilateral treaty as a step towards building a body of international criminal law.

35. Mr. KATEKA (United Republic of Tanzania), noting that the Commission had asked the General Assembly to select the most appropriate form for the draft Code, said that his delegation favoured its incorporation in the draft statute for an international criminal court. The Commission had established an inextricable link between the draft Code and the court, and the two instruments would have to be harmonized. There would be no need to adopt the draft Code in a separate convention, although a convention would be acceptable provided that it linked the draft Code to the court. It should not be adopted as a declaration of the General Assembly.

36. The Commission had reduced the list of crimes to five as a compromise between the maximalist and minimalist trends. His delegation noted that the crimes of international terrorism and illicit drug trafficking had been omitted, together with the crime of wilful and severe damage to the environment. It was not entirely convinced by the argument that a restrictive list of crimes would ensure the widest acceptance of the draft Code, but it agreed with the Commission that the inclusion of certain crimes did not affect the status of other crimes under international law.

37. The omission of a definition of aggression was a source of concern, and the text of article 16, which confined itself to the responsibility of an individual for aggression, might cause problems for the future court. The Commission did note in the commentary that aggression by a State was a sine qua non of individual responsibility for the crime of aggression. Given that linkage, the Commission should at least have defined aggression in general terms and included a list of offences.

38. A distinction had been made between crimes which could be prosecuted on the basis of general international law and those which required the existence of a convention, and the Commission had indicated in the commentary to article 1 that it should be left to practice to define the exact contours of the concepts of crimes against the peace and security of mankind. However, as the Special Rapporteur had pointed out, such reliance on the existence of treaties would limit the progressive development of international law. Accordingly, the Commission or the Preparatory Committee might wish to reconsider some crimes that had been excluded.

39. Subject to those qualifications, his delegation supported the gist of the draft articles, in particular the dual criteria of "systematic" and "large-scale" for the crimes covered by articles 18 and 20, the two separate jurisdictional regimes established in article 8, and an exclusive regime for the crime of aggression (article 16) subject to a limited exception of the national jurisdiction of a State committing aggression against its nationals.

40. His delegation agreed with the Commission's position that the principle of individual criminal responsibility (article 5) was the cornerstone of international criminal law. It endorsed the provisions of article 9 on the obligation of the custodial State to extradite or prosecute and the rejection of the defence of superior orders. The Commission had been wise to leave open the question of specific penalties and it had satisfied international standards of due process and the principles of non bis in idem, non-retroactivity, and extenuating circumstances. His delegation urged Member States to support the draft Code.

41. Mr. CANDIOTI (Argentina) said that the International Law Commission had shown a constant commitment to peace, international security and the dignity of the human person, and it should continue to play an important role in the creation of a fairer world order. The Commission and its Special Rapporteur deserved particular commendation for producing the final text of the draft Code of Crimes against the Peace and Security of Mankind, particularly at a time when States were moving towards the establishment of an international criminal court.

42. The Commission had been right to limit the categories of crimes covered by the draft Code with a view to securing universal acceptance of the text. That approach took into account the evolution of international relations and was consistent with the trend in the Preparatory Committee to limit the competence ratione materiae of the court to a "hard core" of crimes.

43. The definitions adopted by the Commission would facilitate progress towards the characterization of the most serious atrocities committed within a country as international crimes. In the light of events in the former Yugoslavia and Rwanda, serious thought should be given to the current state and future direction of the development of the criminal aspects of international humanitarian law applicable in non-international armed conflicts. His delegation therefore agreed that the category of war crimes should include crimes committed in such conflicts. It had once been generally accepted that neither common article 3 of the 1949 Geneva Conventions or Additional Protocol II thereto could trigger the exercise of a universal jurisdiction and that those provisions did not constitute a sufficient basis for international criminal responsibility. However, article 4 of the Statute of the Rwanda tribunal included both provisions and thus corrected one of the main weaknesses of international humanitarian law. It was encouraging that the Commission had decided to continue that trend.

44. It was correct to include crimes committed in peacetime among the crimes against humanity, for such crimes could jeopardize international peace and security. His delegation also supported the inclusion of crimes committed against United Nations and associated personnel because of the intolerable increase of attacks on them. There was also ample justification for the inclusion of the crime of aggression, but the problem of the definition of aggression would give rise to legal difficulties in the determination of individual criminal responsibility. The issue would require further deliberation, as would the delimitation of the spheres of competence of the international criminal court and the Security Council.

45. Consideration must also be given to the links between the draft Code and the draft statute. It would perhaps be premature to opt for one of the three alternatives proposed by the Commission for the form the draft Code might take, but the Preparatory Committee was the most appropriate forum for discussing the question. The connection between the draft Code and the draft statute was both close and necessary, for in the Preparatory Committee States had tended to favour incorporation in the draft statute of definitions of the crimes falling within the court's competence, so that it would not be a strictly procedural instrument but would include some rules of substantive criminal law. It would be counter-productive if the draft Code and the statute contained different definitions of identical international crimes.

46. Mr. HILLGENBERG (Germany) said that the completion of the Commission's work on the draft Code of Crimes against the Peace and Security of Mankind came at a time when the establishment of the ad hoc criminal tribunals for the former Yugoslavia and for Rwanda had shown the need for codification of the most serious crimes under international law, which, together with an elaboration of procedural regulations, would enable the international community to bring to justice those who were individually responsible for the commission of such crimes. His delegation believed that the draft Code should be adopted, possibly with a few minor adjustments, as a declaration by the General Assembly. It could thus serve as a source of inspiration for the Preparatory Committee currently engaged in drafting a statute for a permanent international criminal court.

47. The German Government strongly supported the Commission's decision to include in the draft Code only those offences generally accepted as crimes against the peace and security of mankind. Given that the purpose of the draft Code was to facilitate the prosecution and punishment of individuals who perpetrated crimes of such gravity that they victimized mankind as a whole, it seemed a very sound approach to restrict the list to a few core crimes, the so-called "crimes of crimes". His delegation was also gratified that the question of implementation had been dealt with in part I of the draft Code, which laid down specific procedural regulations on jurisdiction, extradition and procedural rights of the accused.

48. The extensive catalogue contained in article 11, and also articles 12 to 15, provided sufficient guarantees for a fair trial of any individual charged with a crime against the peace and security of mankind. His Government therefore strongly favoured preserving the principles set forth in those articles. With regard to article 8, however, it believed that it should be the prerogative of national courts to try the perpetrators of the crimes enumerated in articles 17 to 20. An international criminal court should exercise its jurisdiction only where national jurisdiction had failed to bring those perpetrators to justice.

49. In the second and third sentences of article 8, the Commission had tried to establish a balance between the fundamental principle of par in parem imperium non habet and the need to bring to justice by means of national jurisdiction the perpetrators of the crime of aggression. The question arose as to whether a State's jurisdiction should be limited to bringing its own nationals to trial. It could be argued that national jurisdiction should be established in a broader

sense. For example, a State that had been the victim of the crime of aggression could hardly be deprived of the right to bring foreign individuals to justice under its own national jurisdiction. That question, and the question of how to prevent possible abuses, should be further explored.

50. His Government welcomed the fact that the issues of individual responsibility and punishment were addressed in articles 2 and 3 of the draft Code. Article 2, however, should be more specific: paragraph 3 reflected notions of commission, complicity, aid and attempt that were so broad as to render personal liability to prosecution almost limitless, particularly in the light of the principle of nullum crimen sine lege. Too sweeping a notion of participation in a crime could lend itself to abuse, thereby reducing its prospects of being accepted by the international community. Article 2 should focus on enabling the international community to bring to justice the main perpetrators of crimes that were of such gravity as to victimize mankind as a whole.

51. An individual must also know what kind of penalty might follow the perpetration of a crime. It was unfortunate that, in article 3, the Commission had not laid down specific penalties for specific crimes, but had left it to the different legal systems claiming jurisdiction to establish adequate punishment. Not only was that inconsistent with the nulla poena sine lege principle, but it also made implementation of the extradition principle, laid down in article 9, very difficult. Extradition procedures between States that had abolished the death penalty and States that still imposed it had shown what difficulties could arise in such circumstances. In his delegation's view, the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda could have offered a solution to that problem. Under both Statutes, the penalties imposed for the commission of crimes comparable to those enumerated in the draft Code were limited to imprisonment. His Government would have welcomed the incorporation of a similar rule in the draft Code.

52. The crime of aggression must form an integral part of the draft Code, as it was a crime of such gravity as to threaten to victimize mankind as a whole. The Commission had been very successful in limiting the applicability of article 16 to those individuals who had the necessary authority or power to commit the crime of aggression. On the other hand, it had made no attempt to define aggression for the purposes of international criminal law. Difficult though that task was, his delegation strongly believed that, in accordance with the nullum crimen sine lege principle, those elements of fact and personal behaviour which, when combined, constituted possibly the most serious crime against the peace and security of mankind should be described in the Code. As any qualification of individual behaviour as a crime of aggression must be preceded by a determination that a State had committed aggression, and as article 24 of the Charter conferred on the Security Council primary responsibility for the maintenance of international peace and security, such a definition would have to take the responsibility of the Council into account. That question should be further examined.

53. On article 18, his delegation fully supported the inclusion of subparagraph (f), covering institutionalized discrimination on racial, ethnic or religious grounds. Historical experience had shown that such discrimination

could be the first step towards systematic genocide. Relatively recent events in Srebrenica also justified the inclusion of forced disappearance of persons under subparagraph (i).

54. Article 19 constituted the most prominent example of the progressive development of international law within the draft Code, and its inclusion was to be welcomed. However, a few questions remained to be resolved before a final, generally acceptable version of the article was agreed on, including the possible application of the article to the personnel of regional organizations such as the Organization for Security and Cooperation in Europe, the Organization of African Unity and the Organization of American States, and whether paragraph 1 (b) really pertained to a crime of such gravity that it could be classified as a crime against the peace and security of mankind.

55. German foreign policy had long sought to achieve some form of protection of the natural environment in armed conflicts. Environmentally destructive warfare must be combated and punished. His delegation therefore welcomed the addition of subparagraph (g) to the list of war crimes described in article 20.

56. Mr. JOSEPH (Singapore) said that the International Law Commission had left it to the General Assembly to decide on the exact form to be taken by the draft Code. In his delegation's view, the draft Code must be adopted in a form that gave it the necessary binding legal force to ensure its efficacy. It had become apparent that there was a considerable overlap between the issues it raised and those currently being considered by the Preparatory Committee on the Establishment of an International Criminal Court, ranging from the definition of crimes and the principles of criminal responsibility to double jeopardy and the obligation of States to extradite or prosecute. Rather than being the subject of a separate exercise aimed at the drafting of an international convention and conducted in parallel with efforts to establish the international criminal court, the draft Code should be forwarded to the Preparatory Committee with a recommendation that it should be used, along with other proposals before the Committee, as the basis for drafting the statute of the court.

57. The definitions of crimes contained in part II of the Code represented a substantial contribution to the development and codification of international criminal law. His delegation particularly welcomed the inclusion of crimes against United Nations and associated personnel and the use in armed conflict of methods and means of warfare calculated to cause widespread, long-term and severe damage to the natural environment, particularly in the light of their emergence as crimes under customary international law.

58. Certain aspects of the definition of crimes and the principles of criminal responsibility required further elaboration. For instance, there was no detailed treatment of the applicable defences under article 14. The precise definition of whether and when criminal liability attached to an individual was of critical importance if effect was to be given to the nullum crimen sine lege principle. Individuals must be in a position to apprise themselves of the law and its limits in order to know whether a proposed course of action was legal or not, particularly where decisions potentially falling within the scope of international criminal jurisdiction were involved.

59. His delegation also had serious reservations concerning article 12, paragraph 2 (b), which appeared to derogate from the non bis in idem principle. While the territorial State and the victim State both deserved sympathy, that was not sufficient reason for overriding that principle. Where the custodial State had not acted in good faith or had shielded the accused from criminal responsibility, the solution would be to vest the court with the power to make an objective determination to that effect and to exercise the appropriate jurisdiction to ensure that justice was done.

60. Nevertheless, while certain aspects of the Code required further reflection or elaboration, his delegation broadly endorsed its provisions, many of which should be incorporated in the statute of the international criminal court.

61. Mr. ECONOMIDES (Greece) said that, from the legal standpoint, one could question the wisdom of establishing a dual regime whereby crimes of aggression - far and away the most serious crime in relations between States - would be tried by an international criminal court, while the other four crimes included in the draft Code would be subject to the concurrent jurisdiction of national courts and an international criminal court. It was not clear why a case of aggression which had been noted, explicitly or implicitly, in a Security Council resolution, could not be subject to concurrent jurisdiction in the same way as, for example, a crime against humanity instigated or directed by a Government, as envisaged in article 18.

62. The draft Code was not complete, as the Commission itself recognized in paragraph (3) of the commentary to article 2. His delegation was disappointed by its reduced scope and felt that other crimes such as intervention, colonial domination and other forms of alien domination, apartheid and the recruitment, use, financing and training of mercenaries should have been included. One major crime had been omitted, the threat of force, which under Article 2, paragraph 4, of the Charter was, along with force itself, expressly and categorically prohibited. The prohibition of the threat of aggression was a fundamental rule which was generally considered to have acquired the character of jus cogens. That omission should be remedied, particularly since for the less serious crimes envisaged in articles 17 to 20, the draft Code went quite far and rightly punished not only complicity but also attempt. At the very least, an additional provision should be inserted in article 1 specifying that those crimes, although not included in the text of the draft Code, were nevertheless crimes against the peace and security of mankind and were regulated, as applicable, by ad hoc international conventions and customary rules which at times had the value of jus cogens.

63. With regard to article 3, the need to punish severely individuals who were responsible for crimes against the peace and security of mankind should derive directly from the text of the article and not only from the commentary. His delegation noted that the draft Code did not exclude the death penalty. In article 5, the phrase "if justice so requires" was superfluous; in articles 14 and 15 the expression did not appear, although it was implied.

64. His delegation felt that until the Preparatory Committee on the Establishment of an International Criminal Court completed its work, it would be unwise to take a decision on the final form of the draft Code. The Committee

should urge the Preparatory Committee to draw on the draft Code as broadly possible and in particular to incorporate the definitions of crimes found in the text of the draft statute. The best solution would be to coordinate the draft Code and the statute to the extent possible.

65. Turning to the question of State succession and its impact on the nationality of natural and legal persons, he said that in September 1996, the European Commission for Democracy through Law (Venice Commission), an intergovernmental body of the Council of Europe, had adopted a declaration and explanatory commentary on the consequences of State succession for the nationality of natural persons. The declaration dealt only with natural persons largely because of the lack of State practice with regard to the nationality of legal persons. The Venice Commission had relied mainly on State practice, but had also taken into account conventional and above all customary international law.

66. The declaration laid down three fundamental principles - the right of each person to a nationality, the obligation to avoid statelessness, and the right of option - and set forth rules and recommendations for the practical implementation of those principles.

67. The most important rule was that in all cases of succession, the successor State must grant its nationality to nationals of the predecessor State residing permanently in the territory concerned. That obligation was in the interests of both the successor State and the persons concerned, and accorded with State practice and with the rules of general international law. The successor State could choose not to grant its nationality to nationals of the predecessor State who did not have effective links with the territory concerned or those who were residing in the territory in order to perform public service.

68. Two other rules established the principle of non-discrimination. First, nationality must be granted, as a human right, to all nationals of the predecessor State residing permanently in the territory concerned, without any distinction as to ethnic origin, religion, language or political opinions. Second, once nationality was granted, there could be no discrimination of any kind among nationals of the successor State. Moreover, it was desirable for the successor State to grant its nationality to persons from the territory affected by the succession who had the nationality of the predecessor State and who, at the time of succession, were not resident in that territory, and to persons residing permanently in the territory affected by the succession who, at the time of succession, had the nationality of a third State.

69. In order to prevent persons from becoming stateless, the successor State must grant its nationality to any persons, whether permanent residents of the territory concerned or persons originating from that territory, who would become stateless as a result of succession, and must not withdraw its nationality from its own nationals who were not entitled to acquire the nationality of the successor State.

70. It was left to the discretion of successor States to determine the conditions in which the right of option would be granted, but they were required to grant that right in favour of the predecessor State when the persons

concerned had effective links with that State, and in favour of one of the successor States when the persons concerned had links with that State or had previously held the nationality of a subdivision of the predecessor State corresponding to that successor State. The right of option must be exercised within a reasonable period from the date of succession and must have no adverse consequences for the persons concerned, particularly with regard to their residence in the successor State or their movable or immovable property in that State - a new rule which derived from the progressive development of law and accorded with international human rights standards.

71. It was specified in the commentary to the declaration that the succession must be legal under international law and must not result from occupation or annexation through the use of force in violation of Article 2, paragraph 4, of the Charter, and that when settling questions of nationality, States involved in succession must respect the human rights of the persons concerned.

72. His delegation could accept the Special Rapporteur's suggestion that the question of the nationality of natural persons in cases of State succession should be given priority, but felt that it was too early to take a decision on the form of the instrument to be adopted.

The meeting rose at 12.45 p.m.

UNITED NATIONS

General Assembly

FIFTY-FIRST SESSION

Official Records

SIXTH COMMITTEE
33rd meeting
held on
Wednesday, 6 November 1996
at 3 p.m.
New York

SUMMARY RECORD OF THE 33rd MEETING

Chairman:	Mr. ESCOVAR-SALOM	(Venezuela)
later:	Ms. WONG (Vice-Chairman)	(New Zealand)
later:	Mr. ESCOVAR-SALOM (Chairman)	(Venezuela)

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The meeting was called to order at 3 p.m.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued) (A/51/10 and Corr.1)

1. The CHAIRMAN announced that the report of the International Law Commission (A/51/10 and Corr.1) would be considered in four sections. He invited delegations to comment first on chapter II, concerning the draft Code of crimes against the peace and security of mankind.

2. Mr. AKBAR (Pakistan) said, with reference to the definition of the crimes against the peace and security of mankind, that it would be preferable to concentrate on legally definable crimes and to avoid areas which were controversial or where abuses might occur. Terrorism could take many different forms, and international terrorism was only one of them. It was therefore essential to re-examine the definition of terrorism in order to include, for example, State terrorism.

3. Pakistan supported the Commission's solution, which restricted the scope of the Code to five categories of crimes, but it would like to have certain crimes such as the recruitment, use, financing and training of mercenaries, colonial domination and other forms of foreign domination restored to the list. Systematic or mass violations of human rights should constitute a separate category and be dealt with in a separate article, for that would enhance the scope of the universal principles contained in the Charter of the United Nations. During their examination of the topic the members of the Commission should ensure that the concepts which they were developing were consistent with the principle of State sovereignty, in order to facilitate the adoption of the Code and its universal acceptance.

4. Mrs. ŠKRK (Slovenia) said that the Code of crimes against the peace and security of mankind would complement the functioning of the future international criminal court and also serve domestic legal systems by unifying the criminal law and practice concerning the crimes which were considered to be the most serious crimes under international law. From that perspective, the structure of the draft Code was well-founded.

5. Slovenia fully supported the principle of the supremacy of international law with regard to direct and individual responsibility for crimes against the peace and security of mankind. It also believed that the rules and principles applicable to individual responsibility - and to the various forms of complicity - envisaged in article 2 were clearly drafted and consistent with the rules of international law. However, the attempt to commit a crime should be the subject of a separate paragraph of article 2, and the Commission should also consider the case of an individual who had intended to commit a crime but voluntarily renounced his intention.

6. Turning to article 3, she said that punishment should depend not only on the consequences of a crime but also on the subjective circumstances of the culpability of its perpetrator, such as motive, intent and the various forms of depravity and cruelty.

7. Article 8, on jurisdiction, was one of the key provisions of part one of the draft Code. In it the Commission confirmed the principle of universal jurisdiction over crimes against the peace and security of mankind, except for the crime of aggression, which would fall under the jurisdiction of the future international criminal court. However, the provision which envisaged jurisdiction from the standpoint of the nationality of the alleged perpetrator was not clear: the State victim of the aggression should also have jurisdiction to try the crime if its criminal legislation so required.

8. The Slovene delegation was in favour of the inclusion of the obligation to extradite or prosecute and of the possibility of extraditing alleged perpetrators. However, that amounted to prejudging the legal nature of the future Code. At present only a treaty - and not a declaration - could serve as the legal basis for extradition or the obligation to prosecute or extradite. For that reason her delegation reiterated its view that the Code should take the form of a treaty.

9. As other delegations had already pointed out, there must be no conflict between the treatment of the fundamental principles of criminal law such as minimum judicial guarantees, non bis in idem and non-retroactivity in the draft Code and in the statute for an international criminal court.

10. It was unacceptable that extenuating circumstances such as the age of the alleged offender should be addressed within the framework of grounds for lessening the degree of culpability. The Slovene delegation had already raised on several occasions the question of the responsibility of juvenile perpetrators of the most serious crimes as an issue deserving special treatment in strict conformity with human rights and humanitarian principles.

11. Her delegation regretted that neither the draft Code nor the draft statute mentioned the non-applicability of statutory limitations to war crimes, genocide and crimes against humanity. The Commission ought to take that point into account, for the purpose of such non-applicability was to facilitate the prosecution of the alleged perpetrators of the most heinous crimes.

12. The Slovene delegation fully supported the Commission's decision to limit the scope of the draft Code to five categories of crimes. It was glad that institutionalized discrimination on racial, ethnic or religious grounds resulting in serious disadvantaging a part of the population had been included in the list. The Commission had also done well to include the grave offences and the acts and atrocities covered by Additional Protocols I and II to the 1949 Geneva Conventions among the war crimes dealt with in draft article 20.

13. However, it was not convinced by the Commission's approach to the definition of war crimes, which had to be committed "in a systematic manner or on a large scale". For example, war crimes which caused serious and long-term damage to the environment, such as attacks on nuclear power stations or dams, constituted crimes against the peace and security of mankind according to the draft Code. It would be difficult for such crimes to be committed "in a systematic manner or on a large scale".

14. With regard to the final form of the draft Code, the Slovene delegation believed that it should be adopted by means of a treaty: it had always considered that it should be separate and independent from the statute for an international criminal court. That should not preclude the Preparatory Committee on the Establishment of an International Criminal Court from drawing on the provisions of the draft Code and the commentaries thereto in order to complete its work before April 1998.

15. Ms. LIND (Norway), speaking also on behalf of Denmark, Finland, Iceland and Sweden, expressed appreciation for the impressive amount of work accomplished by the International Law Commission at its forty-eighth session and the fact that the Commission had been able to complete the second reading of the draft Code of Crimes against the Peace and Security of Mankind. Four of the five categories of crimes defined in the draft were universally recognized as being part of customary international law and, as such, were already binding on all States. The fact that the draft Code focused on the most serious international crimes should prove very significant for the consideration of the draft statute for an international criminal court. The fulfilment by the Commission of its mandate and its decision to concentrate on those main crimes should give a strong impetus to the work on the international criminal court.

16. The inclusion of a provision on crimes against United Nations and associated personnel reflected the increase in such crimes in recent years and highlighted the importance of the new Convention on the Safety of United Nations and Associated Personnel. It was fortunate that acts of warfare causing severe damage to the environment had been included in article 20 (g) and recognized as crimes against the peace and security of mankind, even though the definition given of such acts was not entirely satisfactory.

17. Overall, the Nordic countries were satisfied with the outcome of the Commission's work, which should be considered further in the context of national legislation and in the relevant international forums.

18. Ms. Wong (New Zealand), Vice-Chairman, took the Chair.

19. Mr. GALICKI (Poland) noted that almost 50 years had passed since the General Assembly had requested the International Law Commission to prepare a draft Code of offences against the peace and security of mankind and to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal. It had therefore become necessary to take into account new events, new categories of crimes, new political factors and new rules of international law which had been adopted in the meantime. Those developments seemed to be well reflected in the final text of the draft Code; he welcomed the improvements made to it, particularly the reduction of the scope of the draft to five categories of crimes, which increased the chances of its being accepted by a majority of States.

20. The draft statute for an international criminal court had also been one of the Commission's major tasks, which had been taken over first by the Ad Hoc Committee and later by the Preparatory Committee. There could be no doubt that the list of crimes covered by the draft Code and the jurisdiction of an international criminal court were closely linked. That was why the Commission

had proposed that the Code should be incorporated into the statute of an international criminal court. He was convinced that the draft Code would be a very useful instrument for the precise definition of the crimes falling within the court's jurisdiction.

21. The catalogue of crimes against the peace and security of mankind had special symbolic importance for his country, in the light of its history. He fully supported the inclusion in that list of crimes against United Nations and associated personnel, as it was essential for the international community to protect those who acted on its behalf.

22. Lastly, in order to ensure the widest possible acceptance of the draft Code, it should take the form of an international treaty, either as a separate international convention or as part of the statute of an international criminal court, as suggested by the Commission. He did not, however, reject the final possibility recommended by the Commission, namely, the adoption of the Code as a declaration by the General Assembly which could be further improved and reshaped into a binding instrument. He was convinced that the adoption of the Code would help to provide a solid basis for the principle of individual responsibility for the most serious crimes, which would thus be universally recognized as such in international law.

23. Mr. MOMTAZ (Islamic Republic of Iran) said that, as the draft Code adopted by the Commission identified only five crimes against the peace and security of mankind, its scope had been drastically reduced. In its quest for compromise, the Commission had sacrificed juridical idealism, i.e., an exhaustive codification of international crimes, to political expediency. He shared the regrets expressed on that score by some members of the Commission and noted that the draft Code represented a retreat from the draft on State responsibility. For instance, article 20, paragraphs (b) and (c), characterized a number of violations of international law as international crimes, whereas the individuals who gave the necessary orders and those who carried them out were not covered by the Code, which was regrettable.

24. Nevertheless, he noted with satisfaction that, for the Commission, the exclusion of certain crimes did not affect the status of other crimes under international law. A case in point was intervention, a crime referred to in the Judgement of the International Court of Justice in the case Military and Paramilitary Activities in and against Nicaragua, which touched on areas where State sovereignty allowed each State to act as it saw fit. Intervention, which in the Court's view was illegal when it utilized coercive means, could take less blatant forms than the use of armed force, such as unilateral recourse to economic sanctions - a less dramatic but much more effective means, especially in relations between States of unequal power. As recourse to such means was currently tending to increase, at the risk of endangering international peace and security, the inclusion of the crime of intervention in the internal affairs of States would certainly have played a considerable deterrent role.

25. However that might be, he wished to make some observations on the 20 articles of the draft Code. With regard to the provisions on the scope and application of the Code, he said that, as only five offences had been identified, it might be helpful to include a definition of crimes against the

peace and security of mankind. Such a definition could guide the progressive development of international law in that area and lead to the inclusion of new offences within the scope of the Code. One possibility might be to revert to the criterion of extreme gravity proposed by the Special Rapporteur, Mr. Doudou Thiam, in his third report in 1985 for characterizing crimes against the security of mankind. Another possibility might be to choose the definition of State crimes which the Commission had proposed in the draft articles on State responsibility, namely, any breach of an "international obligation ... essential for the protection of fundamental interests of the international community ...".

26. Turning again to the definition of crimes against international peace and security, he said it was regrettable that article 20 of the Code applied only to war crimes committed in a systematic manner or on a large scale. That new criterion and the extreme gravity criterion were extremely subjective and might cause difficulties if applied. A case in point was the characterization of attacks against works or installations containing dangerous forces as a crime. The same was true of other violations of the law of armed conflict mentioned in the new draft, i.e., the employment of poisonous weapons calculated to cause unnecessary suffering or the wanton destruction of cities, towns or villages not justified by military necessity.

27. On the other hand, he noted with satisfaction that the transfer by an occupying Power of its own civilian population into the territory which it occupied was included in the list of crimes. Nevertheless, it was regrettable that the new draft did not characterize the employment of illegal arms as a crime, and that it referred only to weapons calculated to cause unnecessary suffering, such as poisonous weapons. The advantage of the old formula was that it had covered biological and chemical weapons, the ban on which, while originating in conventional law, was now considered to reflect a well established custom.

28. His delegation, finally, welcomed the fact that the new draft Code prohibited the use of means of warfare not justified by military necessity with the intent to cause long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population. It considered that that provision was implicitly aimed at nuclear weapons, whose use inevitably entailed such consequences.

29. With regard to armed conflict not of an international character, the acts listed in article 20, paragraph (f) were, with the exception of acts of terrorism, already covered by article 3 of all four Geneva Conventions of 1949. The preambular part of that article stated that in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict would be bound to apply, as a minimum, the provisions of the article. In its judgement handed down in the affair concerning Military and Paramilitary Activities in and against Nicaragua, the International Court of Justice had rightly considered that article as the expression of "fundamental general principles of humanitarian law" (para. 218). Respect for those provisions was clearly required. The question was whether the characterization as a crime proposed in the draft Code was based on customary law. It was true, as the Commission had pointed out, that, in the Statute of the International Tribunal for Rwanda, the Security Council had expanded the

characterization of crime to include acts committed during the internal conflict which had wracked that country. The Security Council had innovated, since the provisions of the Protocol Additional to the four Geneva Conventions of 1949 (Protocol II) made no mention of the notion of "grave infraction", the legal basis for the characterization as a crime of such acts and for the application of the principle of universal jurisdiction.

30. In these circumstances, the characterization as crimes of the acts listed in article 20, paragraph (f), raised certain difficulties: such acts were not on the same scale as violations of international humanitarian law, such as the genocide which had taken place in Rwanda and the ethnic cleansing in the former Yugoslavia. It should also be pointed out that the horrors committed in Rwanda and in Bosnia and Herzegovina were already covered by articles 17 and 18 of the draft Code, which were devoted to the crime of genocide and to crimes against humanity, respectively.

31. Turning to the provisions ratione personae of the draft Code, he noted that the structure of the Code rested entirely on the notion of individual international crime, which had long been established in international criminal law. Certain crimes, such as genocide, arbitrary or forced deportation and settlement in occupied territory, could not be the acts of mere individuals and constituted both crimes of State and crimes of individuals. The question was whether the official capacity of the author of the crime and the fact that he had acted on orders relieved him of all criminal responsibility. According to article 5 of the draft Code, the fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order did not relieve him of criminal responsibility, which would negate the very principle of the criminal responsibility of the individual. The solution proposed was therefore quite satisfactory, particularly since it provided for attenuating circumstances.

32. In arriving at its judgement, the tribunal must evaluate a number of elements, but it appeared that the decisive criterion was in fact that of the subordinate's freedom of action, since mitigating circumstances were recognized only if the individual had the possibility of disobeying and not carrying out the order received without exposing himself to certain death.

33. As for the reverse situation, that of the hierarchical superior dealt with in article 6, the proposed solution and the accompanying commentary were equally satisfactory. The criminal responsibility of subordinates and of superiors who ordered the execution of acts characterized as crimes would certainly be such as to dissuade those who might be tempted to commit one of the crimes covered in the draft Code.

34. It was regrettable that the draft Code merely touched on the question of penalties. While recognizing that it was virtually impossible to establish a scale of punishment for each crime or a uniform system of penalties, his delegation nevertheless regretted the absence of any position on that point, which was hardly consistent with the principle nulla poena sine lege and that of nullum crimen sine lege.

35. Since the same degree of gravity was attached to all acts characterized as crimes in the draft Code, the Code could contain a provision of a general nature by virtue of which States committed themselves to impose on the authors of such acts the heaviest punishments in their arsenal of penalties. That was the approach adopted in many of the conventions to combat terrorism, and more particularly, in the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. It also had the advantage of not encroaching on the prerogatives of States, while at the same time guaranteeing that individuals judged to be guilty would be, on account of the extreme gravity of their acts, dealt with in an exemplary manner. His delegation therefore proposed that article 3 of the draft Code should be modified accordingly.

36. In conclusion, he suggested that, in order to maintain the parallel, the modalities for the adoption of the draft Code should be the same as those used for the adoption of the Statute for the International Criminal Court.

37. Mr. ELARABY (Egypt) recalled that, at its previous session, the Commission had restricted the scope of the draft Code of Crimes against the Peace and Security of Mankind by reducing to five the number of crimes covered by the Code, in order to facilitate a consensus. The Egyptian delegation wished to make a number of comments on that subject.

38. Firstly, the draft Code did not contain a sufficiently precise definition of what was meant by crime against the peace and security of mankind and merely listed, following the example of the Charter of the Nuremberg Tribunal, a number of acts which could be considered to be threats against the peace and security of mankind. That restrictive approach could be seen in article 1 of the draft Code, which provided that "the present Code applies to the crimes against the peace and security of mankind set out in Part II". The Commission had explained that it had chosen that approach in order to speed up its decision, but it was possible that, at the same time, it might have overlooked the need to have a clear text of general application, qualities which would ensure greater precision and more effective application. That matter needed to be re-examined.

39. His delegation supported in part the approach followed by the Commission in its previous sessions, namely, to retain only those crimes whose gravity could not easily be contested, as well as crimes of a clearly political nature which posed a threat to international peace and security and therefore to exclude crimes, such as piracy, trafficking in women and children, racial discrimination, recruitment of mercenaries and foreign intervention. It was regrettable that the Commission had neglected to make separate provision, as it had envisaged in its previous session, for grave damage that was deliberately caused to the environment. In view of their destructive effects, however, such acts deserved to be covered. It might have been possible to characterize them as crimes against the peace and security of mankind, in cases where they had been committed deliberately, repeatedly and systematically, and had caused serious harm to individuals and to the environment. He considered as excessively restrictive the three conditions set out by the Commission for damage deliberately caused to the environment to be characterized as crimes of war falling under the Code (armed conflict, intention, prohibited means).

40. He also regretted that the Commission had decided to remove the threat of aggression from the list of crimes, especially since his delegation had requested the retention of that item, which was of great importance to the maintenance of international peace and security.

41. Noting that the draft Code did not contain a precise definition of the crime of aggression, he recalled that his delegation had suggested the use of the definition of aggression contained in General Assembly resolution 3314 (XXIX), which would have given international legitimacy to that definition and contributed to the more effective harmonization of the work of the United Nations. Those who had opposed those views had argued that, unlike the above-mentioned resolution, the draft Code dealt firstly with the responsibility of individuals. His delegation remained convinced that there was all the more reason for the Commission to extend the definition of aggression given by the General Assembly to individual responsibility, since article 4 of the draft Code did not prejudge the responsibility of the State for crimes committed against international peace and security. Moreover, without a definition of aggression, application of article 16 would be difficult, since an international or national tribunal would have difficulty in trying individuals for crimes that were not defined, even in cases where the Security Council had declared that aggression had taken place.

42. His delegation welcomed the fact that the Commission had reproduced the definition of the crime of genocide contained in article II of the Convention on the Prevention and Punishment of the Crime of Genocide and that it had extended that definition to include complicity in genocide, conspiracy to commit genocide, incitation to commit genocide and attempted genocide.

43. His delegation also welcomed the amendments which the Commission had made on second reading to article 18, particularly subparagraph (k) thereof concerning other inhumane acts, as they clarified the provision. He was pleased to note that, in the same article, the Commission had again added to the list of crimes against humanity those which were the subject of various conventions, such as the forced disappearance of persons, rape, enforced prostitution and other forms of sexual abuse. On the other hand, subparagraph (f) concerning the crime of institutionalized discrimination on racial or ethnic grounds should be reviewed in detail, as earlier international conventions on human rights did not include that crime and subparagraph (e) addressed the same issue. Subparagraph (f) could therefore be deleted.

44. Concerning article 19, the decision to include crimes against United Nations and associated personnel in the draft Code had been taken at the Commission's most recent session and States had not had time to consider the article in question or to comment on its content and form. The problem of personnel security had prompted the General Assembly to conclude, in 1994, the Convention on the Safety of United Nations and Associated Personnel. Article 19 should be carefully considered in the light of that Convention with a view to ascertaining the extent to which its inclusion in the draft Code was justified.

45. With regard to article 20, the Commission had broken new ground compared with previous years by deciding that a war crime would constitute a crime against the peace and security of mankind only when committed in a systematic

manner or on a large scale. That new criterion might entail the constitution of two categories of war crime, namely those which falling within the jurisdiction of the proposed international criminal court and those constituting crimes against the peace and security of mankind, which, to be considered as such, must have been committed in a systematic manner. His delegation believed that it would have been preferable to refer directly to the 1949 Geneva Conventions and their Additional Protocols. Moreover, the crimes included under article 20, subparagraph (f), namely acts in violation of international humanitarian law applicable in armed conflict not of an international character, were included under paragraph 3 common to all four Geneva Conventions. He therefore questioned whether the draft Code should cover such acts.

46. It was still too early to take a decision concerning the final form of the draft Code. States required a little more time to consider and comment on the draft as presented by the Commission.

47. Mr. YEPEZ (Venezuela), referring first to article 3 of the draft Code, said he feared that penalties would be heterogeneous if the determination of punishment were left to States. Furthermore, it was inappropriate to define penalties in the draft statute of the international criminal court, which should contain the rules governing its establishment and functioning. It was therefore regrettable that the draft Code said nothing about the penalties applicable to each of the crimes it covered, and did not even indicate minimum and maximum penalties. It could, for example, state that the penalty applicable to a crime against the peace and security of mankind should be at least equivalent to that provided for under the internal law of the country of which the accused was a national. As for maximum penalties, his Government wished to exclude the death penalty and life imprisonment, which were prohibited by the Venezuelan constitution.

48. Article 7 merely stated that the official position of an individual who committed a crime against the peace and security of mankind did not relieve him of criminal responsibility or mitigate punishment. That position could, however, have been regarded as an aggravating circumstance in that abuse of authority increased the responsibility of the accused.

49. His delegation accepted the restriction on the number of crimes covered by the draft Code, provided that it could be revised and updated after its entry into force. It would therefore be helpful if the final provisions authorized its revision by a conference of plenipotentiaries, which could be held every five or 10 years.

50. His delegation believed that the draft Code should be adopted in the form of an international convention that was separate from all other international instruments, including the draft statute of the international criminal court. On the other hand, it would set standards which the court could follow in judging and punishing conduct characterized as a crime against the peace and security of mankind. It should be adopted at a conference of plenipotentiaries, thereby serving as testimony to the political will of Member States. The Secretariat could prepare draft final articles that established a procedure for revision of the future Code, defined the relationship between the latter, the draft statute of the international criminal court and international conventions

or treaties, and prohibited the formulation of reservations with a view to ensuring the universality and integrity of the Code.

51. Mr. ENKHSAIKHAN (Mongolia) said he welcomed the Commission's adoption of the draft Code, which was the culmination of work conducted over almost half a century. He noted that the draft Code listed only five types of crime, presumably in the interest of facilitating its adoption by Governments, and welcomed the inclusion of crimes against United Nations and associated personnel as being the least that the international community could do, given the nature of the Organization's mission.

52. His delegation was not entirely happy, however, with article 16, on the crime of aggression. In its view, the scope of the draft Code was substantially narrowed by the fact that the article focused exclusively on the role of the individual in acts of aggression committed by a State. The provision was drafted in such a way that aggression perpetrated by States would go unpunished by the international criminal court. Punishments would depend on the discretion of victorious States or the international body having primary responsibility for the maintenance of international peace and security, which could establish ad hoc judicial bodies and would have full latitude to define, on a case-by-case basis, their scope and application, as well as the degree of responsibility of States or their representatives. Nevertheless, his delegation was aware that the draft articles under consideration appeared to be the most acceptable solution at the current stage. It hoped, however, that a review would be undertaken when the time came.

53. He regretted that the draft articles did not recognize damage to the environment as a separate crime and that it was simply included in article 20 on war crimes. It was incomprehensible that such a crime should be recognized in the case of armed conflict and not in the absence of conflict. The Commission cited lack of precedents in international law as a compelling reason for its exclusion from the list of crimes. However, there were sufficient case studies and international agreements to serve as a basis for codification. The international community should seek to preempt a catastrophe that would compel it to conclude and negotiate promptly an international convention, as it had done after the Second World War and the Chernobyl tragedy, for instance. It should nevertheless bear in mind that a criminal act comprised acts of both commission and omission, actus rea and mens rea (the criminal act and intent to harm), a consideration which it should not overlook. His delegation proposed that the question of environmental crimes should be considered again in an appropriate forum in parallel with the further consideration of the draft Code.

54. Concerning other draft articles, if the draft Code were to be an instrument separate from the draft statute of the international criminal court, the draft articles should spell out the general rules and principles that established individual criminal responsibility and should define minimum penalties. In that connection, bearing in mind that the draft Code and the international criminal court would form part of a single international legal regime, he hoped that the court's statute would provide more specific guidance on issues which were not clearly defined in, or omitted from, the draft Code. Significant portions of the articles of the Code could be included in the statute with a view to ensuring that the two instruments were consistent, an issue to which he hoped

the Preparatory Committee on the Establishment of an International Criminal Court would give careful consideration.

55. Since most of the crimes listed in the draft Code had been included in treaties or become part of customary law, the draft Code should take the form of an international convention, in order to avoid weakening the authority of existing instruments.

56. Mrs. LADGHAM (Tunisia), noting that the Commission had considerably reduced the scope of the draft Code said she wondered whether such a minimalist approach was really appropriate, given the objective sought. Of the 12 crimes listed in the text adopted on first reading, the Commission had retained just four, namely aggression, genocide, crimes against humanity and war crimes, which had been supplemented at the Commission's most recent session by crimes against United Nations and associated personnel. However, the Commission had not totally excluded the other crimes since apartheid and wilful and severe damage to the environment had been mentioned in articles 18 and 20 of the draft.

57. Her Government regretted that the Commission had not retained the crime of terrorism, despite the number of delegations favouring its inclusion. The Chairman of the Commission had indicated that, in accordance with the criteria listed in article 18, acts of terrorism could be included among crimes against humanity, insofar as they had been committed systematically or on a large scale with the instigation of a government, organization or group. Her Government still believed that the Commission should have included a separate article giving a general definition of international terrorism. Moreover, if the Commission had characterized acts of terrorism as a crime and included them in the Code it would have provided additional proof of the international community's determination to wage a relentless war on terrorists.

58. The question of applicable penalties was another area in which the Commission had erred on the side of caution. It had limited itself to a very general provision which left it to the competent court to determine the applicable penalty, taking into account the nature and gravity of the crime and, where appropriate, any attenuating circumstances. Three options had nevertheless been put forward by Governments during the 1995 deliberations: setting maximum and minimum penalties, setting only a maximum penalty and setting a penalty for each crime. Her delegation preferred the last option. Arguing from the position that the sentence handed down would depend on the judicial system in which the case was brought, the Commission had shied away from being precise. Her delegation would have preferred the Commission to have provided a more detailed indication of the penalties that could be incurred, in the manner of most national penal codes.

59. Her delegation advocated the adoption of the draft Code in the form of a binding instrument which would be incorporated into the statute of a future international criminal court. The General Assembly could instruct the Preparatory Committee on the Establishment of an International Criminal Court to examine ways in which the draft Code could be thus incorporated.

60. Mr. VARŠO (Slovakia) said that the draft Code currently before the Committee had a dual purpose: to prevent crimes which threatened universally

recognized human values and to punish them by establishing ways in which their perpetrators would be judged.

61. His delegation supported the Commission's decision to retain only the most serious crimes, especially as it had stated in paragraph 46 of its report (A/51/10 and Corr.1) that it was understood that the inclusion of certain crimes in the Code did not affect the status of other crimes under international law. That decision was also in keeping with the well-established thinking in the international community that the Code should refer only to crimes whose 'extraordinary' nature merited exceptional juridical treatment.

62. Article 8 of the draft Code laid down the principle of the concurrent jurisdiction of national courts and a future international criminal court. His Government believed that international jurisdiction should have priority, at least insofar as the crime of aggression was concerned. It nevertheless recognized that, until the international criminal court became a reality, the issue would remain theoretical. But there was no time like the present for considering the factors that needed to be taken into account in order to forestall a conflict between international and national jurisdictions. To the extent possible, and for several reasons, it was important to avoid judging crimes in an artificial environment, far from the place where they had been committed: first, it was preferable that the victims of criminals should be able to attend the trial; second, holding the trial in situ would help prevent the same crime from being repeated in the region concerned; and third, by making itself acquainted with local rules and customs, the court could better understand the context in which the crimes had been committed and thus arrive at a more objective decision. Once that assumption was made, the issue of the priority of competences would acquire almost secondary importance.

63. The draft Code should form part of the statute of a future international criminal court, but whatever form it took it was essential to ensure, at all costs, that it did not go unheeded.

64. Mr. SWAMI (India) said his delegation regretted that the text adopted by the Commission on second reading had excluded several crimes which his Government considered important and which had been included in the text adopted on first reading. The draft Code in its current form did not meet the expectations of the international community.

65. The crimes of intervention, colonialism, apartheid and terrorism should be considered as crimes against the peace and security of mankind, and as such they should be included in the Code. Their inclusion would ensure that the Code had universal value and provide a guarantee against the future occurrence of such crimes.

66. In article 16, contrary to its definitions in articles 17, 18 and 19, the Commission had defined the crime of aggression in very rudimentary terms. The definition was so vague that it made it very difficult to draw any conclusions about the individual responsibility of the perpetrators, which after all was the purpose of the article. His delegation believed that the Commission should define aggression in the Code, even if such a definition was based on the one adopted by the General Assembly in its resolution 3314 (XXIX) of 1974.

67. His delegation was satisfied with the definition of the crime of genocide, but the matter of effective prosecution remained a problem. With respect to crimes against humanity, the basic question revolved around knowing precisely when a violation of the principles of humanitarian law or human rights, which would normally fall within a domestic jurisdiction, would become a matter of international concern. The question was very complex and required general agreement at the international level. It would be naive to believe that the simple fact of characterizing certain types of behaviour as crimes would be sufficient to eliminate them. Moreover, however abhorrent an act might be, it should not come within the purview of the Code unless it threatened or was likely to threaten the peace and security of mankind.

68. With respect to war crimes, it was important to make clear that the Code should deal only with international armed conflicts involving serious violations of international law committed in a systematic manner or on a large scale; it should clearly exclude any attempt to cover non-international armed conflicts.

69. His delegation attached great importance to the topic of international terrorism, which should form a separate category in the Code.

70. Substantial additional work was required to arrive at a text which could command wide agreement.

71. Mrs. FLORES (Mexico) said that she would have preferred a clear separation between the provisions on the general principles of criminal law and those on the procedures to be followed. Moreover, the draft would be improved by the inclusion of other principles, particularly with respect to the age of individual criminal responsibility and the statute of limitations. Likewise, the provisions on applicable penalties, individual responsibility, defences and extenuating circumstances should be further developed.

72. Her delegation had serious reservations about draft article 12, entitled "Non bis in idem". While it was intended to set forth the principle that an individual could not be tried and convicted more than once for the same crime, the article provided for so many exceptions that its effect was virtually nullified. The text should therefore be carefully reworked and its applicability should be limited only in truly exceptional circumstances.

73. Her Government was pleased that the Commission had included the crime of aggression in the Code, but felt that aggression should be defined as proposed by the Special Rapporteur in the Commission's report on the work of its forty-seventh session (A/50/10). Conversely, it believed that, despite their seriousness, crimes against United Nations and associated personnel were out of place in the draft Code.

74. The crimes dealt with in articles 17, 18 and 20 should be defined more precisely, although her Government was pleased that the definition of war crimes in article 20 included the acts listed in Protocol I Additional to the 1949 Geneva Conventions.

75. Lastly, Mexico felt that the General Assembly should instruct the Preparatory Committee on the Establishment of an International Criminal Court to

consider the draft Code, with a view to incorporating it into the statute of the future international criminal court.

76. Mr. CHUNG (Republic of Korea) said, with reference to both the draft Code and the draft statute of an international criminal court, that acts of aggression were among the most heinous crimes. He welcomed the progress made towards establishing a permanent international criminal court, as well as the completion of the draft Code, which represented the outcome of over 40 years' work.

77. The draft Code should be incorporated into the statute of the court, for three reasons: first, both substantive and procedural law preferably should be dealt with in the same text, since that would observe the principle of nullum crimen sine lege and would facilitate the work of the international criminal court; second, the adoption of the Code as an international convention could place the court in an awkward position if it had to decide which laws applied to a State which was a party to its statute but not necessarily to the Code; and third, the fact that the Commission had considerably narrowed the scope of the Code would make it easy to include the latter in the statute.

78. Both the Code and the statute defined the crime of aggression without specifically referring to "war", whereas the Nürnberg Charter had referred to the concept of a "war of aggression". A distinction should be made between a "war of aggression" and an "act of aggression", since those two concepts differed not in substance but in magnitude: an act of aggression could involve participation in only one or some of the phases of aggression, giving rise to individual criminal responsibility in each phase, whereas a war of aggression could involve participation in all phases of aggression.

79. The General Assembly had adopted two resolutions on the definition of aggression, to which the Commission did not refer in its commentary: resolution 95 (I) (Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal) and resolution 177 (II) (Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal). Resolution 177 (II) directed the Commission to formulate, not to comment on, the principles affirmed by the General Assembly. Those resolutions could become sources of law for the definition of crimes of aggression under public international law, since the Commission had already drawn upon them in formulating the seven principles on crimes of aggression which were reflected in articles 16, 17, 18 and 20 of the draft.

80. With respect to the crime of the threat of aggression, his delegation did not share the Commission's view that the concept was too nebulous; on the contrary, a threat of aggression backed by an action was just as serious as an act of aggression, and enabled a State to invoke Article 39 of the Charter of the United Nations. Consequently, his delegation supported the definition proposed by another delegation in that regard, which appeared as the fifth alternative in the report of the Preparatory Committee on the Establishment of an International Criminal Court (A/51/22, vol. II). In addition, General Assembly resolution 3314 (XXIX) of 14 December 1974 contained a definition of aggression that deserved to be given due consideration because its normative

content made it a suitable guideline for the Commission, if not a legally binding text.

81. With respect to crimes against humanity, his delegation endorsed the extension of the definition of such crimes to include those committed in time of peace as well as those committed in time of war. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which had been one of the sources of the draft Code, had already broadened the definition of crimes against humanity. His delegation therefore supported the draft Code to the extent that it reaffirmed the concept of crimes against humanity as defined by the Nürnberg Tribunal.

82. Mr. BAKER (Israel) said that the first issue he wished to raise was that of the form which the Code should take and the relation between the Code and the statute of the international criminal court.

83. Israel felt that it was necessary to observe two principles: that the Code should achieve the widest possible acceptance, and that there should be no discrepancy or inconsistency between the provisions of the Code and those of the statute of the court. There was an indissoluble link between the Code and the statute, since they had a common purpose, which was to ensure that the perpetrators of abhorrent crimes did not go unpunished. However, they dealt with different situations: the court was intended to try individuals when national justice systems were unavailable or ineffective, while the Code was intended to define the most serious crimes which could serve as a basis for prosecution, either in national courts or in an international criminal court. The Code should therefore be adopted as a declaration of the General Assembly, since that would encourage its acceptance by the largest possible number of States. The declaration could also serve as a basis for the definition of the crimes to be included in the statute. That approach would help to ensure broad acceptance of the Code and consistency between the Code and the statute.

84. With respect to the draft Code itself, he noted with satisfaction that the number of crimes had been reduced to five. He then analysed some of the articles, beginning with article 2. Subparagraph (b) or (d) of paragraph 3 should be made more precise, or an additional subparagraph should be included, to indicate more explicitly that an individual could be held responsible for a crime committed through a third party.

85. Although the explanation given by the Commission in its commentary on article 3 was satisfactory, the article raised issues similar to those discussed in the context of the future statute of the international criminal court with regard to penalties and, in particular, restitution, compensation and confiscation of instruments serving the purpose of crime. In the context of the draft Code, the question nevertheless remained whether guidelines should be included for the jurisdictions in which persons would be tried.

86. Similarly, with regard to article 14, since the Code defined the crimes themselves, the defences available to individuals charged with such crimes must be defined with equal precision.

87. Article 7 was not sufficiently clear and should be reformulated along the lines of article 5 so as to emphasize that persons who had given an order to commit crimes were subject to the same punishment as those to whom they had given the order. That would avoid a contradiction between articles 5 and 7.

88. Article 12, paragraph 2(a)(i), meant that States must not only take measures to ensure that the crimes enumerated in the draft Code were part of their national law, but also must ensure that such crimes were characterized using the same terminology as that used in the Code. Difficulties might arise for a State whose penal code did not characterize such crimes as "crimes against a peace" and "war crimes", even if it classified as crimes the specific offences mentioned in articles 16 to 20. An individual who committed a crime must be responsible for the full extent of his criminal conduct, and the Commission should give some thought to that matter.

89. With regard to Part II of the draft Code, his delegation understood the logic set out in the commentary of the Commission regarding article 16. However, as long as the definition of the international crime of aggression - aggression by a State - continued to be elusive, the question of individual criminal responsibility for such a crime could not be considered separately. As had been done in the case of the other crimes dealt with in Part II of the draft Code, the crime of aggression for which individual criminal responsibility arose must be directly related to the components of the crime, and the components must be defined.

90. With regard to the crime of genocide, dealt with in article 17, the delegation of Israel could only state that it was the most abhorrent of the crimes dealt with in the Code. It had been the central principle of the debate since the first session of the International Law Commission.

91. The Commission had added new elements to article 18. Any crime added to those originally listed in the Charter of the Nürnberg Tribunal must be exceptional crimes warranting definition as crimes against humanity. It was not the objective of the draft Code to be original or to develop substantive law between States, but rather, to establish the criminal responsibility of individuals for acts of a most serious and abhorrent nature. The exclusion of a crime did not in any way imply that it was not a violation of international law, but merely that the crime remained within the sphere of specific treaty relationships and did not belong on the "pedestal" of the crimes dealt with in the draft Code.

92. The Israeli delegation was puzzled by the inclusion of article 19. Although it did not question the seriousness of crimes against United Nations and associated personnel, his delegation believed that they were not among the most serious crimes and it recalled the existence of the Convention on the Safety of United Nations and Associated Personnel adopted in 1994.

93. Like other Member States, Israel considered article 20 to be complex and sometimes confusing because it attempted to include all the major conventional sources of international law, irrespective of the extent to which they had been accepted as law by the international community. The definition in article 20 should be based on those acts which had been defined as grave breaches in

customary law or in conventions which embodied customary law. The inclusion in the article of additional elements must be regarded as exceptional, since those States which had not accepted instruments defining such crimes presumably would have similar difficulties subscribing to a code in which they were also included. If war crimes were to be defined as intended by the Commission in its commentary on article 20, then consideration should be given to whether the acts detailed in the article really were of such seriousness as to be specifically included in the Code.

94. In conclusion, the burning issue was what the impact of the draft Code would be on the negotiations regarding the establishment of the international criminal court and what the relationships between the Code and the court would be - relationships which States should have the opportunity to assess pending the resumption of discussions on the establishment of the new institution.

95. Mr. Escovar-Salom (Venezuela), Chairman, resumed the Chair.

96. Mr. CRISOSTOMO (Chile) welcomed the adoption of the draft Code, which represented many years of effort. He was pleased that the Commission had reduced to five the number of the most serious crimes constituting threats to international peace and security. The five crimes (aggression, genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes) were acts which had been defined in international law, whether conventional or customary law. The greater the number of States that acknowledged the existence of such crimes, the more quickly the Code would be adopted and implemented.

97. With regard to the crime of aggression, the Code drew an important distinction between aggression and the crime of aggression. According to Chapter VII of the Charter, which gave the Security Council the ability to determine the existence of an act of aggression, aggression could only be perpetrated by a State. However, article 16 of the draft Code provided that an act of aggression was an act perpetrated by an individual.

98. Crimes against Red Cross personnel - who often were more vulnerable than United Nations personnel - also should be included in the category of crimes against United Nations and associated personnel.

99. The Chilean delegation believed that the statute of the international criminal court, although closely related to the Code, should be independent from it in order to encourage their adoption by many States. To integrate the Code with the court's statute would only keep the international community waiting longer at a time when it was so eager to see a universal criminal jurisdiction become a reality. Although it was too early to determine what form the Code should take, it should, given its importance to the international community, be included in an international treaty to which all States would subscribe.

100. In conclusion, he said that a legal rule guaranteeing respect for individual rights was absolutely essential in order to restore and maintain the peace and security of mankind. The prompt adoption and implementation of the Code therefore represented a milestone in the evolution of international law.

The meeting rose at 6.15 p.m.

UNITED NATIONS

General Assembly

FIFTY-FIRST SESSION

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SIXTH COMMITTEE
34th meeting
held on
Thursday, 7 November 1996
at 10 a.m.
New York

SUMMARY RECORD OF THE 34th MEETING

Chairman: Mr. ESCOVAR-SALOM (Venezuela)

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AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued)

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The meeting was called to order at 10 a.m.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued) (A/51/10 and Corr.1, A/51/332 and Corr.1, A/51/358 and Add.1, and A/51/365)

1. Mr. ADDO (Ghana) said that the structure of the draft Code of Crimes against the Peace and Security of Mankind constituted a general framework within which key issues had been well identified and presented. His delegation welcomed the reduction in the number of crimes covered in the text adopted on second reading from twelve to five. That simplification should facilitate universal acceptance of the eventual end product of the work on the topic.

2. On jurisdictional issues, his delegation noted that article 8 envisaged a role for both national and international criminal systems in the case of the crimes set out in articles 17 to 20, but that the principle of concurrent jurisdiction did not apply in the case of the crime of aggression (article 16), over which the international criminal court was to have exclusive jurisdiction. Ghana took the view that, unless national criminal justice systems had ceased functioning or demonstrated reluctance to deal with the crimes in question, they must have the prerogative of trying individuals who had committed the crimes set forth in articles 17-20 of the Code.

3. The final form of the draft Code must be such as to ensure its universal acceptance, but no decision could be taken in that regard pending the outcome of the deliberations on the international criminal court.

4. With regard to article 20 (g), his delegation welcomed its focus on the protection of the environment but noted that conduct engaged in "with the intent to cause widespread, long-term and severe damage to the natural environment" did not occur only in wartime. Article 20 (g) should therefore proscribe such conduct in peacetime as well as in time of armed conflict.

5. Lastly, while it welcomed the thrust of articles 9 and 10, his delegation noted that the draft Code did not provide for any sanction in the case of non-compliance with those articles. The assumption of compliance on which the two articles depended might not be borne out by the actual course of events.

6. Mr. KOLOSSOV (Russian Federation) said that the main accomplishment of the forty-eighth session of the International Law Commission had undoubtedly been the completion of its lengthy work on the draft Code. At the current stage, however, detailed comment on the substance of the text would serve only to duplicate the debate taking place in the Preparatory Committee on the Establishment of an International Criminal Court. That was an inevitable result of the change that the underlying philosophy and conception of the draft statute of the court had undergone since it had begun to be considered by States. There had been a common understanding within the Ad Hoc Committee and the Preparatory Committee that the statute should include not only rules regarding the organization and functioning of the court, but also provisions formulating definitions of crimes and general principles of criminal law. Consequently,

much of the debate in the Preparatory Committee focused on issues addressed in the draft Code.

7. As to the ultimate destiny of the draft Code, his delegation considered that no decision should be taken on its future until work on the statute of the court had been completed. It had been proposed that the Code, or part thereof, should be incorporated in the statute, that the provisions of the two texts should be made compatible, and that the draft Code should be transmitted to the Preparatory Committee. His delegation found it hard to accept those proposals, given that the two instruments largely shared one and the same subject. It saw no need for two universal international legal instruments on one and the same set of issues, or for compatibility between the Code, which was the outcome of the work of independent experts, and the statute, which would be the result of negotiations among States. At the same time, the draft Code could prove extremely useful as a source for the work of the Preparatory Committee, and there was no need to adopt a special recommendation of the General Assembly to that effect.

8. Further discussion on the possible future of the Code as a separate document should be resumed once work on the statute of the court had been completed, at either the fifty-third or fifty-fourth session of the General Assembly. By then the content of the statute would be known, and it would be possible to compare it with the draft Code and to decide whether the latter should take the form of a separate document, and if so, what its content should be and what form it should take.

9. Miss RAMOUTAR (Trinidad and Tobago) noted that, with a view to reaching consensus, the Commission had considerably reduced the scope of the draft Code, which currently enumerated and defined just five core crimes. Her delegation welcomed the recognition by the Commission of the finding of the Nürnberg Tribunal that crimes against international law were committed by men, not by abstract entities, and that only by punishing individuals who committed such crimes could the provisions of international law be enforced. Her delegation also considered that the very general language used in article 3 on the issue of punishment was justified, since if the Code was to be enforced by an international criminal court, the penalties applicable would be set forth in an international convention.

10. The Commission had recognized the link between the elaboration of the draft Code and the establishment of an international criminal court. The draft Code and the draft statute both addressed crimes against the international community, and it was increasingly recognized that the deliberations on the two instruments should not continue to be isolated from one another. Her delegation thus joined other delegations that had called for harmonization of the work of the Commission and of the Preparatory Committee on the two issues.

11. With regard to the crimes enumerated in the draft Code, her delegation shared the Commission's view that individual responsibility for participation in the crime of aggression and the commission by a State of an act of aggression were related matters. It supported the inclusion of aggression as a crime under the draft Code, and suggested that a similar approach should be adopted in the

consideration of that crime under the jurisdiction of an international criminal court.

12. Genocide had long been recognized as a serious crime in international law, creating a grave threat to the peace and security of mankind. It was therefore appropriate that that crime should be covered by the draft Code. Her delegation also noted that there was widespread support for the inclusion of genocide as a crime under the jurisdiction of an international criminal court. With respect to crimes against humanity, it welcomed the inclusion in article 18 (k) of "other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm". That provision was important in that it covered acts now unforeseeable which might occur in the future and could thus be included within the provision of the Code without any need to amend the latter. The inclusion of war crimes as defined in article 20, and of crimes against United Nations and associated personnel, was also to be welcomed.

13. Her delegation regretted the exclusion of some of the crimes contained in the draft Code as adopted on first reading, in particular, the crime of illicit trafficking in narcotic drugs. That activity was transboundary in nature, perpetrated on a large scale, and posed a threat to the economic, political and social fabric of States. In the long term, the absence of an international legal forum to address that problem would prove extremely detrimental to the welfare of small developing countries, which were the most vulnerable to the activities of drug traffickers. Inclusion of that crime in the draft Code would underline its seriousness and indicate the international community's willingness to rid the world of it.

14. As to the final forms of the draft Code, her delegation urged that a link should be maintained between the draft Code and the draft statute of an international criminal court. If the former was to be incorporated in the latter, the crimes covered by the two texts should be harmonized, and a provision should be inserted allowing for the inclusion of other crimes of a similar nature in the draft Code, should such crimes arise in the future. Lastly, all the comments regarding the draft Code should be brought to the attention of the Preparatory Committee, to facilitate the progress of its work.

15. Mr. ZAIMOV (Bulgaria) said that the discussions in the Preparatory Committee on the Establishment of an International Criminal Court had facilitated the evaluation of the Commission's work on the draft Code. His delegation accepted the compromise decision to restrict the crimes covered by the draft Code to the five core crimes listed in articles 16 to 20, with a view to ensuring the widest possible acceptance of the Code. It considered, however, that there had been a strong case for retaining the former article 26 (Wilful and severe damage to the environment) as a separate crime, rather than as a war crime. At the same time, it welcomed the inclusion of crimes against United Nations and associated personnel, as such acts posed a direct threat to international peace and security.

16. The principles embodied in articles 11 to 15 were of particular importance, as they provided efficient guarantees of a fair trial. The principle of complementarity envisaged in article 8 should be further elaborated,

establishing a prerogative of national courts to try the perpetrators of the crimes covered by articles 17 to 20. An international criminal court should exercise its jurisdiction only where national jurisdiction had failed to bring the perpetrators to justice. His delegation also shared the view that consistency should be maintained between the draft statute and the draft Code, and that in order to avoid duplication of work the Preparatory Committee should give consideration to the proposal that the draft Code should be incorporated in the draft statute.

17. As to the form which the draft Code should take, his delegation would in principle welcome the incorporation of the draft Code in the statute of the court, but it would be premature to take a decision in that regard while the outcome of the negotiations in the Preparatory Committee remained unclear. On the other hand, if the Code was to be effective, it must be accepted universally and have binding legal force. Thus, his delegation was currently of the view that the draft Code should take the form of an international convention.

18. Bulgaria was committed to the fight against the most serious international crimes and therefore favoured the early establishment of a viable and effective international criminal jurisdiction, based on broad acceptance by States. No effort should be spared to ensure that the draft Code became a successful instrument of international law.

19. Mrs. ÁLVAREZ (Cuba) said that the draft Code would undoubtedly provide a basis for discussion in the Sixth Committee of the central and controversial issue of the definition of crimes coming within the jurisdiction of a future international criminal court. As the Preparatory Committee would have the opportunity to study carefully the most important legal aspects of the draft Code, and as there was a clear lack of consensus on the substance and form of the draft, it would be neither appropriate nor possible to take a final decision on it at the current session.

20. Her delegation was particularly disappointed at the drastic reduction in the list of crimes considered as serious international crimes. Colonial and foreign rule, State intervention, international terrorism and deliberately causing serious damage to the environment were a threat to international peace and security.

21. On the other hand, proposals had been included which lacked the juridical precision necessary to serve the legislative purposes of the International Law Commission. For example, while her delegation condemned all actions which threatened the safety of United Nations and associated personnel and understood the social and political reasoning behind the inclusion of such actions as "crimes" in the draft Code, she thought the proposal suffered from a serious lack of precision. Furthermore, Member States had not had the opportunity to submit comments on the issue either to the Commission or the Sixth Committee. Certain problems of a technical nature had to be addressed before that category of crimes was included in the draft Code. It had been included with undue haste, on the basis of an analysis of a convention which had been ratified by only four States. International consensus on a particular issue was no substitute for the accepted ratification procedure leading to the adoption of a legally binding instrument.

22. In view of those reservations and the need for further rigorous analysis, it would be counter-productive to act hastily. If the draft Code was to become an important source for the subsequent codification and progressive development of international law, it would need considerable revision, which she was confident would be forthcoming.

23. Ms. STEAINS (Australia) briefly traced the origins of the draft Code to the end of the Second World War and said she regretted it had taken so long for the Commission to complete its work on the draft. The end of the cold war had given States the opportunity to establish an effective legal regime to deal with the most serious international crimes, a task given added urgency by the horrific events in the former Yugoslavia and Rwanda. The fact that it had been necessary for the Security Council to establish ad hoc tribunals in response to those events demonstrated clearly the need for a permanent international criminal court. The General Assembly had responded by requesting the Commission to prepare a draft statute for such a court and the discussions on the draft Code had undeniably made a valuable contribution to the work of the Ad Hoc Committee and the Preparatory Committee, especially in helping to define the crimes which should fall within the jurisdiction of an international court. Her delegation welcomed the limitation of the number of crimes dealt with by the Code, which reflected the trend of discussions in the Preparatory Committee.

24. With regard to the form which the draft Code would take, her delegation strongly believed that the Preparatory Committee must continue to be the body responsible for dealing with the issues relating to the establishment of the international criminal court, including all the questions addressed in the draft Code. The outcome of the negotiations on the establishment of a court would provide the answer to the question of the form the Code would eventually assume. While recognizing that the Preparatory Committee would be drawing on aspects of the draft Code, her delegation believed that no action should be taken on the Code at the current session.

25. Mr. MAHIOU (Chairman of the International Law Commission), introducing chapter III of the report of the International Law Commission, said that State responsibility was one of the pillars of the international legal system. Part one of the chapter covered a wide range of issues relating to the origins of international responsibility; part two dealt with various aspects of the content, forms and degrees of international responsibility; part three concerned the settlement of disputes; and two annexes contained provisions relating to the Conciliation Commission and the Arbitral Tribunal envisaged in part three. Part one had been completed in 1980, and since then the Commission had concentrated on parts two and three. At its previous session, the Commission had adopted several new provisions dealing with countermeasures and international crimes and had gone through all the articles in parts two and three to ensure consistency of terminology and make some clarifications.

26. Referring to the new provisions adopted by the Commission at its forty-seventh session, he said that article 47 concerned the right of an injured State to take countermeasures subject to certain conditions specified in articles 47 to 50. Paragraph 1 defined the purpose of countermeasures, which was to induce a wrongdoing State to comply with its obligations resulting from the wrongful act. He noted, however, that an injured State was only entitled to take

countermeasures as long as the wrongdoing State had failed to comply with those obligations and as necessary in the light of the response of the wrongdoing State to the demands of the injured State for such compliance. Paragraph 2 indicated that the right of an injured State to take countermeasures was subject to the conditions and restrictions relating to dispute settlement procedures, the principle of proportionality and the prohibition of certain types of countermeasures. Paragraph 3 provided that the taking of countermeasures by an injured State could not justify the breach of an obligation of that State towards a third State.

27. Article 48 presented the conditions under which an injured State could take countermeasures, while attempting to strike a balance between the interests of the injured and the wrongdoing State. Paragraph 1 required the injured State to negotiate at the request of the wrongdoing State before taking countermeasures, although interim measures to preserve its rights were permissible if they were otherwise consistent with the articles governing countermeasures. Paragraph 2 provided that an injured State which took countermeasures continued to be bound by its obligations relating to dispute settlement procedures. Paragraph 3 required the injured State to suspend countermeasures if the dispute was submitted to a tribunal with the authority to issue binding orders, or the dispute settlement procedure was being implemented in good faith, or the wrongful act had ceased. Paragraph 4 provided that there was no obligation to suspend countermeasures if the wrongdoing State failed to comply with a request or order issued pursuant to the dispute settlement procedure.

28. Because of the controversial nature of the notion of State crimes and its desire to avoid re-examining the articles contained in part one which had already been adopted on first reading, the Commission had limited its consideration to the consequences of "international crimes" (in contrast to "international delicts") in terms of international responsibility and dispute settlement procedures. He drew attention to the note to article 40 on the use of the term "crime"; while continuing to use the term for the sake of consistency, the Commission had noted that the penal implications of the term could be avoided by using alternative phrases such as "an international wrongful act of a serious nature" or "an exceptionally serious wrongful act".

29. Article 51 established the general principle that an international crime entailed all the consequences of any other internationally wrongful act or so-called "international delict" as well as the additional consequences set out in articles 52 and 53. The phrase "any other internationally wrongful acts" was used to refer to the acts called "international delicts" in article 19, paragraph 4. In formulating the draft articles in part two, the Commission had consistently referred to the consequences of an internationally wrongful act, without distinguishing between crimes and delicts, on the understanding that the consequences would apply to all wrongful acts, and that any specific additional consequences resulting from international crimes would be addressed separately. The Commission had concluded that articles 41 and 42, concerning the cessation of wrongful conduct and full reparation respectively, were equally applicable to crimes. However, the Commission considered that the notion of full reparation for crimes or delicts should not extend to the means of subsistence of the population of the wrongdoing State, and had inserted a general limitation to that effect in article 42, paragraph 3. The Commission had also concluded that

restitution in kind, compensation, satisfaction and assurances, and guarantees of non-repetition should be available to a State that was the victim of an international crime. It had not considered it necessary to deal specifically with punitive damages for crimes in view of the various forms of reparation available. In addition, the Commission had considered that the limitations on restitution in kind and satisfaction with respect to delicts under article 43, subparagraphs (c) and (d), and article 45, paragraph 3, respectively, should be lifted in relation to crimes because of their exceptional gravity.

30. With regard to countermeasures, the Commission had concluded that all of the articles in chapter III of part two should apply without exception or modification to international crimes, attaching particular importance to the application of the provisions of articles 48, 49 and 50 to crimes.

31. Article 53 set out the obligations arising for all other States as a consequence of a crime committed by a wrongdoing State. The chapeau of the article embodied the general principle that a State crime entailed the obligations specified in subparagraphs (a), (b), (c) and (d) for every other State.

32. With regard to dispute settlement procedures, the Commission had concluded that the provisions in part three and the relevant provisions of the Charter of the United Nations were sufficient to deal with the characterization of a wrongful act as a "crime" as the term was used in article 19 and that it was unnecessary to design new procedures for that purpose. It had further drawn attention to the options of invoking Article 35 of the Charter or bringing the dispute to the attention of the General Assembly or the Security Council.

33. As indicated in paragraph 23 of its report, the Commission had identified three fundamental issues addressed in the draft articles on which the views of States would be particularly appreciated. One was the proposed distinction between international crimes and international delicts set out in article 19, and the difference in the consequences of those two categories of wrongful acts provided for in chapter IV of part two. The second issue concerned the provisions relating to countermeasures contained in chapter III of part two, and the third concerned the dispute settlement procedures provided for in part three and the two annexes.

34. Mr. HAFNER (Austria) said that the topic of State responsibility lay at the heart of the issue of the legal force of international law, since such force depended on the consequences which a breach of the rules of international law would entail.

35. Articles 47 to 50 appeared to provide a realistic solution to the problem of countermeasures. Article 47 set out the basic definition of the right of an injured State to take countermeasures, which was intrinsically linked to the definition of an injured State contained in article 40. For that reason, problems with the latter article, such as the qualification of all States parties to a multilateral treaty as injured in cases where collective interests were protected, also had a bearing on article 47. His delegation had previously expressed doubts concerning the enlargement of the meaning of "injured State". Furthermore, the relationship between article 47 and article 49 required

clarification; the criterion of "as necessary" contained in article 47, paragraph 1, appeared to place a time limit on countermeasures, whereas the Commission, in paragraph (6) of its commentary to article 47, indicated that the limits on such measures related to their "adequacy" or content.

36. Article 48 was one of the most hotly debated provisions of the chapter on countermeasures. The basic problem was not the formulation of the article, but the position of the principle of the peaceful settlement of disputes within the whole system of international law. While the introduction of the concept of interim measures of protection appeared to be an adequate solution, defining such measures remained a problem. In certain circumstances, where interim measures were permitted but countermeasures were not, it might be difficult to decide whether a particular reaction to an internationally wrongful act was or was not permissible, which would have obvious implications for foreign policy.

37. As to the relationship between the right to take countermeasures and the possibility of resorting to dispute settlement mechanisms, his delegation noted with satisfaction that its concerns had been taken into account by the Commission. Recourse to dispute settlement procedures was no longer the prerogative of the injured State alone; the alleged wrongdoer could now propose such procedures with a view to avoiding countermeasures.

38. Lastly, article 48, paragraph 4, was not very specific concerning the nature of the "request or order emanating from the dispute settlement procedure". As indicated in the commentary, such orders could also include those that were technically non-binding; it was unclear, therefore, whether they could include not only provisional measures indicated by a court, but also recommendations issued by conciliation commissions. The divergence in wording between article 48 and the commentary contributed to the uncertainty, since paragraph 4 referred to "the dispute settlement procedure" without further qualification, whereas the commentary referred to courts and tribunals.

39. At the previous session, his delegation had suggested that the concept of international crimes should be excluded from the draft articles on State responsibility, so as to make it possible to focus on the question of responsibility for internationally wrongful acts, or delicts. His delegation remained convinced of the usefulness of such an approach, especially since the gap between the consequences of such acts and those of crimes had been reduced, to the point where the concept of international crimes might not even be necessary. Article 53, for example, required all States "not to recognize as lawful the situation created by the crime". If, however, crimes were deemed to violate norms of jus cogens, then the obligation set out in article 53 was already part of primary law and did not need to be reiterated in the context of State responsibility.

40. Mr. BROWNLIE (United Kingdom) said that the submission of a complete draft, together with commentaries, of the articles on State responsibility was a significant and long-awaited event. While some of the draft articles, such as those dealing with the attribution of responsibility, had become an authoritative statement of international law, others would need to be modified if the final product was to be generally acceptable to States. His delegation

wished to make preliminary comments on three areas in which difficulties persisted, namely, State crimes, countermeasures and dispute settlement.

41. His delegation had previously expressed views ranging from cautious to sceptical on the proposed distinction between State delicts and State crimes; it was disappointing, therefore, to find that the relevant articles remained in the Commission's draft. While divergent opinions had been expressed by Governments during the debate, his delegation reiterated its view that the notion of a "State crime" had not gained the broad international acceptance required for a new concept with such wide-ranging consequences.

42. The point of distinguishing the concept of crimes from that of delicts, as the Commission indicated in paragraph (1) of its commentary to article 51, was that different consequences followed in each case. The Commission's very difficulty in working out what the legal consequences of a "State crime" might be served to reinforce the view that the concept lacked an adequate juridical basis and should not be retained.

43. It should also be pointed out that the concept of State criminality lacked the modalities for implementation. It was one thing to punish members of a Government or a high command for breaches of international criminal law on the basis of individual criminal responsibility, and quite another to punish a collectivity like a State, which meant punishing its population and economy. Punitive measures of that kind would raise major political, social and moral problems.

44. As to the question of countermeasures, in the current state of international organization, the right of an injured State to have recourse to countermeasures was unavoidable. All national legal systems retained some concept of countermeasures as a response to the violation of rights; there was something dangerously utopian in the notion that if only the international system could be developed further, then the concept of countermeasures could be dispensed with altogether. While there were good arguments for limiting and controlling such measures, his delegation believed that the limits must be practicable and that the controls must not hamper the exercise of the right to take countermeasures. Judged against those criteria, the preconditions set out in article 48, paragraph 1, seemed problematical. To demand prior negotiations as a condition for the lawfulness of countermeasures was to tilt the balance significantly in favour of the wrongdoer or putative wrongdoer. Nor could the balance be redressed satisfactorily by borrowing concepts of interim measures of protection from the field of judicial settlement. Lastly, there was something faintly perverse in the situation envisaged by article 58, paragraph 2, where, by taking countermeasures, the injured State acquired the right to have the underlying dispute settled by arbitration, but only if the wrongdoing State challenged the countermeasures. Overall, it seemed preferable to adhere to the more general guideline that countermeasures should be recognized as a legitimate measure of last resort, subject to a criterion of necessity.

45. Lastly, his delegation supported the inclusion in the draft of appropriate third-party dispute settlement procedures. Nevertheless, the general regime proposed for the settlement of disputes regarding the interpretation or application of the draft articles was very ambitious; it might be more realistic

to concentrate on those parts of the draft where, by common consent, compulsory procedures were desirable, as in the case of countermeasures.

46. With regard to future action on the draft articles, several options were available. One was to move towards the convening of an international conference to conclude a treaty, which appeared to be the assumption adopted by the Commission in its earlier work. That assumption, however, raised questions about the viability of so massive a piece of traditional codification under the current circumstances. His delegation believed, therefore, that alternative ways must be found of absorbing the Commission's work into contemporary international law. The United Kingdom had no preconceived views on the matter and looked forward to a thoughtful debate in the Committee and the Commission.

47. Mr. AL-BAHARNA (Bahrain) said that article 39 (Relationship to the Charter of the United Nations) had given rise to controversy. The effect of the provision was that once the draft articles had been adopted in the form of a convention, the relationship of such a convention to the Charter would be governed by Article 103 of the Charter, and the provisions of the Charter would thus prevail over those of the convention. His delegation suggested that the effect of article 39 could be modified and minimized through certain drafting changes. The word "subject" should be replaced by the words "without prejudice", and the words "as appropriate" should be deleted. The words "and procedure" should also be deleted. The article would then read: "The legal consequences of an internationally wrongful act of a State ... are without prejudice to the provisions of the Charter, etc.".

48. If that proposal was not accepted, the alternative would be to delete article 39 altogether. In the light of Article 103 of the Charter, such a provision was not needed to establish the priority of State obligations, and it was hardly conceivable that the draft article was intended to supplement Article 103, as indicated in the Commission's report.

49. His delegation had already expressed its views regarding articles 41 to 46 and did not think it necessary to revert to those provisions at the current session. His delegation had no difficulty, however, in accepting article 42 as currently drafted, with the addition of a new paragraph 3 proposed by the Drafting Committee.

50. Articles 47 to 50, which dealt with countermeasures, deserved comment. Article 47 allowed an injured State to take countermeasures against a wrongdoing State in order to induce that State to comply with its obligations under articles 41 to 46. The article stipulated, however, that the taking of countermeasures was subject to the conditions and restrictions set out in articles 48 to 50, and that the adoption of such measures against a State which had committed a wrongful act should not affect the injured State's obligations towards a third State. His delegation agreed that, while an injured State was entitled to take countermeasures against a State committing an internationally wrongful act, that right should be exercised only as a last resort, when the wrongdoing State failed to comply with its obligations. The article was well balanced and contained the necessary criteria for mitigating the impact of countermeasures on the wrongdoing State. A further mitigating element was to be found in the reference in article 47, paragraph 1, to articles 41 to 46, which

provided for a series of remedies to be sought in good faith by the State which had committed the wrongful act with a view to avoiding countermeasures. His delegation therefore supported article 47.

51. Article 48, which restricted the conditions under which an injured State might resort to countermeasures, was also well balanced and had his delegation's support, as did article 49 on proportionality and article 50 on prohibited countermeasures, which were self-explanatory. There was no need to expand the interpretation of the principle of proportionality any further, for the matter had to be left to the court concerned with the dispute settlement. Taken together, articles 47 to 50 maintained the balance between the interests of the wrongdoing State and those of the injured State. It should be noted that some members of the Commission, while approving the provisions on countermeasures contained in chapter III, preferred that the procedures for the peaceful settlement of disputes should be exhausted prior to the taking of countermeasures, a consideration discussed in a balanced manner in the commentary to article 48.

52. Turning to chapter IV, on international crimes, he said that article 19 had provoked heated discussion in the Commission, which had found it necessary to include a chapter on the consequences of an international crime committed by a State. The effect of chapter IV was that all the remedies applicable to international delicts would apply to international crimes, as would the provisions concerning countermeasures. The additional consequences applicable to international crimes were set out in articles 52 and 53. Paragraphs (c) and (d) of article 43 limited restitution in kind, as opposed to compensation, when it would seriously jeopardize the political independence or economic stability of the wrongdoing State. However, that limitation did not apply to international crimes because of their serious nature and in that case restitution could not be denied. His delegation had no difficulty in supporting chapter IV.

53. The members of the Commission had generally been in favour of the draft articles contained in part three, on the settlement of disputes. The dispute settlement mechanism provided for in those articles represented a bold step forward in the progressive development of international law, for the doctrine on dispute settlement had traditionally been based on consent to or free choice of means of settlement, whereas the current text made recourse to conciliation compulsory if either party rejected the other options. His delegation agreed with those members of the Commission who had thought the criticisms of such a compulsory mechanism groundless. It drew attention, in conclusion, to the importance which the Commission had attached to the provisions on dispute settlement.

54. Mr. HOFFMANN (South Africa), speaking on behalf of the 12 States members of the Southern African Development Community (SADC), said that the Commission had taken further strides forward at its latest session. The completion of the work on the draft Code of Crimes was particularly welcome, for the Code could now play a crucial role in the preparations for the establishment of a permanent international criminal court. One of the cornerstones of the court's draft statute was the absolute applicability of the principle of nullum crimen sine lege, so that during 1997 much attention would focus on the definition of the

crimes falling within its jurisdiction. The Commission had been wise to take note of the Preparatory Committee's work on the definition of crimes. The draft Code should be dealt with in 1997 in the context of the definition of the crimes to be included in the court's jurisdiction.

55. The Commission had asked the General Assembly whether the draft Code should be adopted as a convention, incorporated into the draft statute of the court or adopted as a declaration. To issue a declaration at the current stage might compromise the Preparatory Committee's work on the definition of crimes, and the General Assembly's decision on the fate of the draft Code would be influenced by the forthcoming negotiations on the draft statute. The SADC States therefore kept an open mind on the question.

56. The Commission had reached another milestone by completing the first reading of the draft articles on State responsibility. The SADC States supported the general drift of the draft articles and found the dispute settlement procedures and the conditions for the institution of countermeasures particularly encouraging. As small States, they emphasized that countermeasures were not always a satisfactory remedy between States of unequal size. The conditions and limits contained in the draft articles were therefore useful, as was the possibility of codifying binding international rules in that regard. The distinction between international delicts and international crimes should be retained.

57. The SADC States took note of what the report had to say about the other topics in the Commission's programme of work and about potential future topics and looked forward to further developments thereon. The member States would respond individually to the requests for specific comments. As to the Commission's future work, they had a preference for the topics of diplomatic protection and unilateral acts of States. The Commission should be encouraged to continue to identify new areas of work. The southern African region had nominated three of its eminent international jurists for election to membership of the Commission, a clear indication of its commitment to international law and its progressive development.

58. Mr. SIMMA (Germany) said that the topic of State responsibility still represented a huge task for the Commission and the road to the adoption of the draft articles might well be long and rocky. His delegation wished to respond to the Commission's request for comments on three of the issues involved.

59. First, the German Government had always been sceptical about the legal feasibility and political desirability of the concept of international crimes. Now that the entire system of the legal consequences of such crimes was on the table its apprehensions had not been dispelled. The two latest Special Rapporteurs had proposed a variety of safeguards subordinating individual responses to crimes of States to United Nations law and procedures, in order to "domesticate" the consequences of the Commission's decision to consider all States as "injured" by international crimes. The existing draft articles were devoid of any such safeguards but did provide for the relaxation of the usual limitations on claims for reparation and a set of obligations arising for all States. Furthermore, the provisions on dispute settlement did not contain any element of compulsory arbitration specifically designed to counter the dangers

of unleashing the concept of international crimes in an international legal environment still characterized by individual auto-determination of rights and duties.

60. Accordingly, his delegation wondered whether the world really needed a concept of international crimes entailing so many troubling consequences. With regard to the list of crimes contained in article 19, cases of aggression were already covered by the Charter system, particularly Chapter VII, and the law on collective self-defence; flagrant violations of the right to self-determination also fell under Chapter VII; human rights were the subject of a range of Charter-based and treaty-based procedures and, indeed, serious breaches of human rights obligations could also be taken up by the Security Council as threats to the peace; prevention of massive damage to the environment was a matter for multilateral treaties; and intentional pollution by a State was again a matter for Chapter VII. It might therefore be preferable to put the genie of international crimes back into the bottle. That would not save the Commission from having to address the repercussions of the related concept of obligations erga omnes in State responsibility but would enable it to go about that task in ways less prone to misunderstanding and possibly abuse. If the wish was to add a punitive element to the established rules on State responsibility, it would soon be possible to resort to the draft Code of Crimes and the international criminal court.

61. Second, with regard to countermeasures, the Commission was in principle to be commended for striking a careful balance between the rights and interests of injured States and those of States subjected to such measures. But some problems remained. For example, the concept of 'interim measures of protection' might well prove troublesome if such measures were exempt from the duties of prior negotiation and submission to arbitration, for an injured State might decide to resort immediately to such action, which the target State might regard as full-blown countermeasures. However, the concept might create an incentive for States to accept the element of compulsory arbitration contained in article 58, paragraph 2. That element ought to be protected against any attempt to destroy the balance by evading the obligation to resort to arbitration by means of a reservation while accepting the conventional licence to engage in countermeasures.

62. Third, on the question of dispute settlement, his Government welcomed the Commission's proposal to include some measure of compulsory third-party involvement, but it reiterated that there was no need to reinvent the wheel: the dispute settlement provisions should be expressly assigned a role subsidiary to the many existing procedures.

63. As to the final form of the draft articles, there was little chance of a binding convention on State responsibility being adopted. However, there did exist a solid body of customary international law on the matter which might be negatively affected by the adoption of such a convention. The Commission should therefore give serious thought to presenting its final product as a declaration or expository code. The commentaries to the draft articles were certainly more useful to the practitioner than the abstract draft articles themselves. It would be a pity if the Commission's work were to end up as a still-born treaty

which damaged the customary rules on State responsibility, even though unratified conventions could have an influence on State practice.

64. Mr. CALERO RODRIGUES (Brazil) said that at the forty-ninth session of the General Assembly his delegation had described countermeasures as "a distasteful institution" because they operated unfairly between stronger and weaker States and were not subject to any external control. Furthermore, even if the States concerned were of equal strength it was very doubtful that countermeasures would lead to fulfilment of the obligation of reparation. They would only create tensions between the States which would eventually have to be resolved by some peaceful settlement procedure. That result might be achieved earlier if such a procedure was adopted instead of countermeasures. Currently, a State suffering an injury as a result of an internationally wrongful act was entitled to take countermeasures, but such entitlement was based only on its own conviction, which might be an erroneous one. Of course, the State taking the countermeasures ran the risk of incurring responsibility itself if it later transpired that no wrongful act had been committed. The better approach would always be to seek a solution by peaceful means. If such means established that a wrongful act had been committed, then the injured State, if no other recourse was available, might be authorized to take countermeasures.

65. The measure of control established over the implementation of countermeasures was a step in the right direction; however, much remained to be done. In the interval between the failure of negotiations and the establishment of an arbitral tribunal, a State might be subject to the adverse effects of such countermeasures. It should be possible for either party to invoke arbitration unilaterally as soon as the dispute was characterized. It was pointless to delay recourse to arbitration, since it could effectively induce a State to comply with its obligation of reparation. His delegation agreed that measures for the preservation of rights should be taken immediately upon the occurrence of the wrongful act (article 48). However, "interim measures of protection" should be more precisely defined; a distinction should be drawn between such measures and countermeasures subject to the limitations of a general regime. In that context, it would be helpful if the arbitral tribunal could decide at an early stage whether the measures taken were truly interim measures and whether they were warranted.

66. The commentary to article 19 proved that the distinction between crimes and delicts was not arbitrary. As outlined in the commentary, the acceptability of that controversial distinction lay in the possibility of a meaningful statement of the consequences arising from each category of internationally wrongful act. However, the articles of part two, chapter IV, which established only very slight substantive differences in that regard, were not sufficient to justify the maintenance of the distinction established by article 19. Article 52, despite its promising title ("Specific Consequences"), was disappointing because it eliminated two limitations on restitution in kind and the restriction on satisfaction prohibiting demands impairing the dignity of the wrongdoing State. The Commission's justification for the elimination of that restriction seemed odd. Moreover, there was no discussion of differences in the instrumental consequences. It seemed unlikely that countermeasures, the highly individualized remedy provided for delicts, would also be appropriate in a case where the entire international community had been injured.

67. Referring to article 53, concerning the obligation of cooperation created by an international crime, he said that if a collective response by the international community was to be achieved through countermeasures, there must be a central institution with authority both to determine the fact that an international crime had been committed and to coordinate that collective response. The fact that the Commission believed that the United Nations could serve as the central institution amounted to recognition of the convergence of the law of State responsibility and the law of international security embodied in the Charter of the United Nations. The Charter contained provisions on the organization of a collective response to the wrongful acts of States which endangered international peace and security. Such acts were unquestionably breaches of obligations essential for the protection of the fundamental interests of the international community, referred to as international crimes in article 19. While the two categories of acts might not coincide completely, they should not be separated. It could be argued that, under the law of international security, decisions were taken by political organs and under the law of State responsibility, decisions would be taken by judicial bodies and would be binding on all States on questions relating to international crimes. No such judicial body existed and it was highly unlikely that the international community would agree to establish one. The concept of international crimes should not be included in the articles on State responsibility unless provision was also made for the establishment of machinery to deal with the legal consequences of such crimes. Otherwise, the distinction between the consequences of "international delicts" and "international crimes" would be purely descriptive or didactic, lacking the normative element which the Commission had considered essential in drafting article 19.

68. Mr. CAFLISCH (Observer for Switzerland) said that the thoroughness and detail of the draft articles on State responsibility, although commendable, caused unnecessary complications at times. One example was the sequence of articles 5 to 10 on attribution to the State of the conduct of various parties and entities, which was followed by article 11 on the conduct of persons not acting on behalf of the State. At other times, the text was repetitive. Article 17 on the breach of an international obligation did not add anything of significance to the principle set forth in article 16. Similarly, article 18, paragraph 1, and article 40 merely stated the obvious.

69. The distinction between international crimes and international delicts might create more problems than it would solve. It was a distinction that was meaningless unless the consequences entailed by the two categories of violations were drastically different. Article 52 (a), which did away with limitations on restitution in kind for an international crime, was particularly dangerous. It could be used to justify inflicting serious punishment on an entire people for the wrongdoing of its Government, thereby compromising international security and stability. Moreover, to the extent that the concept of "crime" overlapped with violations of the peremptory rules of international law, all States could consider themselves to be "injured" within the meaning of article 40, paragraph 3, even without determining whether the conduct in question was considered a "crime". Furthermore, in the absence of a judicial mechanism that could be invoked unilaterally, wrongful conduct was characterized largely by the States concerned; thus, the conflict over the violation itself would be compounded by a further disagreement over its characterization. In fact, his

delegation had doubts about the appropriateness of establishing international crimes of States in addition to those of individuals. The exercise seemed to be an attempt to conceal the ineffectiveness of the existing rules on State responsibility behind an ideological mask. His delegation was therefore not in favour of drawing the distinction between crimes and delicts. It hoped that, during the second reading of the draft articles, the Commission would carefully reconsider whether it was necessary to do so.

70. Overall, the provisions on countermeasures were balanced and well-drafted. Nonetheless, the words "economic or political" should be deleted from article 50 (b), since environmental and other forms of coercion could also endanger the territorial integrity or political independence of a State. His delegation was satisfied with the provisions on the settlement of disputes with respect to countermeasures. However, with regard to the settlement of disputes in general, a conciliation procedure that could be invoked unilaterally, welcome as it was, was insufficient. If conciliation failed, each State must be able to launch a judicial process that would culminate in a binding verdict. That alone would ensure the effectiveness of any future convention on State responsibility.

71. His delegation also wished to comment on some specific articles. With regard to article 19, it might be useful to establish a connection between the crimes of States and the crimes committed by individuals, as defined in articles 16 to 20 of the draft Code of Crimes. Article 19 on State responsibility did not in fact mention war crimes, crimes against humanity and crimes against United Nations and associated personnel, which might entail State responsibility in addition to the criminal responsibility of the individual perpetrators. It would be paradoxical if that latter responsibility could come into play without the concomitant responsibility of the State.

72. The provision on the complicity of States contained in article 27 had no foundation in positive law and embodied a purely causal responsibility; it should be deleted from the text. The second aspect of the problem dealt with in article 28 - the responsibility of a State victim of coercion - should be addressed in the provisions on circumstances precluding wrongfulness contained in chapter V.

73. Article 37, on lex specialis, rightly provided that the rules of international law governing a particular situation should prevail over the general provisions contained in the draft articles. However, it might be appropriate to enter a reservation concerning article 60 of the 1969 and 1986 Vienna Conventions on the Law of Treaties, which enabled a contracting party to terminate a treaty with respect to another contracting party which had violated the treaty's basic rules. The current wording of article 37 might give the impression that that specific reaction excluded any other consequences, i.e. those deriving from the draft articles on State responsibility. That was not the case, and the situation should be clarified.

74. Article 45, paragraph 2 (c), seemed to cover ground already covered in article 44, paragraph 2, and should perhaps be deleted.

The meeting rose at 1.10 p.m.

UNITED NATIONS

General Assembly

FIFTY-FIRST SESSION

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SIXTH COMMITTEE
35th meeting
held on
Thursday, 7 November 1996
at 3 p.m.
New York

SUMMARY RECORD OF THE 35th MEETING

Chairman: Mr. ESCOVAR-SALOM (Venezuela)

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AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued)

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The meeting was called to order at 3.10 p.m.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued) (A/51/10 and Corr.1, A/51/177 and Add.1-5, A/51/178, A/51/332 and Corr.1, A/51/358 and Add.1, A/51/365)

1. Mr. CROOK (United States of America), referring to the issue of State responsibility, said that while there was much in the draft articles adopted by the International Law Commission at first reading which could make a lasting contribution to the law, the text had serious flaws which, unless they were corrected, would make it unacceptable to his Government.

2. The very concept of State crimes did not find support in State practice and gave rise to confusion. Moreover, in practical terms, the provisions on reparation for State crimes did not make sense. For example, they would appear to permit all States to seek reparation from Cambodia for the Khmer Rouge's failure to safeguard human lives, or to seek reparation from a State that damaged its own "human environment". However, in neither case did State responsibility law seem to provide an effective instrument for remedying the underlying problem. Thus, it was both inappropriate and unproductive for the Commission to try to weave new rules regarding supposed international crimes by States into the fabric of State responsibility law. The Commission must therefore delete that controversial and unhelpful feature from the draft articles.

3. Another flaw of the draft articles was that they proposed inflexible and impractical dispute settlement provisions. Indeed, there was an infinite variety of legal and factual circumstances and disputes potentially implicating State responsibility. That was why it was not possible or responsible to decree any particular rigid form of settlement. Moreover, the form of settlement envisaged by draft articles 54 to 60 could be burdensome and costly for the parties. For all those reasons, the Commission must take a more realistic position regarding dispute settlement during the second reading of the draft articles. At most, the Commission should propose only alternative voluntary mechanisms which States might use.

4. The treatment of countermeasures under the text of the draft articles adopted at first reading created serious and unnecessary difficulties. While countermeasures must be used carefully, they could be an important means to encourage international legality. Indeed, a State might need to take immediate steps to induce compliance by a violating State and to avoid further injury to itself. But, the draft articles placed unjustifiable limits on an injured State's ability to protect itself in that way. For example, article 48 required that prior to taking countermeasures, an injured State must fulfil its obligation to negotiate provided for in article 54, without stipulating how much time must be spent on such negotiations. Thus, if a State violated a treaty commitment, the injured State apparently could not withhold a proportionate benefit to the wrongdoing State under the same or a different treaty without some months of prior negotiation; it must accept continued injury to itself. Moreover, article 48 did not specify the nature of interim measures of protection which were necessary for the injured State to preserve its rights, or

how such measures differed from the proportionate countermeasures prohibited by the article. In other words, the Commission's approach neither conformed to State practice nor was sound. The Commission must respect the legitimate and important role of proportionate countermeasures in assuring international legality.

5. The standard of compensation for violations of State responsibility unjustifiably departed from established customary international law, in that an injured State was entitled to obtain for itself, or for the national for whom a claim was brought, full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition (article 42). However, that standard of full reparation was badly undercut by the provision that in no case should reparations result in depriving the population of a State of its own means of subsistence. Obviously, that qualification to the rule of full reparation was highly subjective and vulnerable to abuse. It offered an easy escape for potential expropriators or others who had committed wrongful acts and who sought to avoid responsibility for their actions.

6. It was well established in international law, and confirmed in the recent practice of States and decisions of international tribunals, that full reparation (particularly in the case of expropriation), must be prompt, adequate and effective. Responsibility could not be qualified by the means or asserted lack of means of the State that committed a wrongful act.

7. Lastly, the draft articles cast unnecessary doubt on the central role of interest as part of compensation. Article 44 provided that compensation covered any economically assessable damage sustained by the injured State, and might include interest and, where appropriate, loss of profits. Indeed, modern tribunals that had considered the matter had consistently held that interest was a part of compensation.

8. The Commission must correct those flaws if its work was to receive acceptance and have a chance of usefully influencing the future behaviour of States.

9. Mr. MIKULKA (Czech Republic), referring to the issues on which the Commission requested the views of Governments, noted with respect to the distinction between international delicts and international crimes, that care should be taken to treat the issue of the choice of terms (delicts or crimes) separately from the substantive problem, namely, the existence of two categories of wrongful acts which, however they were characterized, fell under two qualitatively different regimes. Indeed, he feared that the purely academic controversy surrounding the distinction between the two categories of wrongful acts based on the choice of such terms, would hold up progress in the consideration of the draft articles as a whole.

10. In his delegation's view, it must be borne in mind that responsibility under international law was neither civil nor criminal, but purely international and, consequently, specific. Therefore, in its second reading of the draft articles, the Commission should consider the possibility of either choosing other, more neutral terms, or avoiding the use of specific terms to refer to two

different types of wrongful acts and making the distinction by other means, such as by dividing the text of the draft articles into different sections dealing separately with the consequences of wrongful acts as such and wrongful acts which threatened the fundamental interests of the international community as a whole. The Commission should confine itself to the use of the term "internationally wrongful acts", which was uncontroversial. That would ensure that the draft articles used neutral terminology, while giving State practice and doctrine enough latitude to devise, at a later date, terminology that would be acceptable to all.

11. The essential need with respect to the draft articles on State responsibility was to decide whether there were, in fact, two different types of wrongful acts and, if so, to determine the consequences of an internationally wrongful act which adversely affected the fundamental interests of the international community as a whole. In sum, it was necessary to set forth the secondary rules brought into play by the violation of primary rules. The characterization of crimes in article 19 implied that it was, above all, the nature of the primary rule that determined which violations constituted crimes, thus reinforcing the impression that the definition of crimes depended on the codification of primary rules, which went beyond the Commission's mandate. However, it was widely felt that the question of whether the violation of a rule of international law came under a specific responsibility regime depended not so much on the nature of the primary rule as on the extent of the violation and of the negative consequences it entailed. Therefore, in its second reading of the draft, the Commission should carefully re-examine that aspect of the problem of the distinction between international crimes and international delicts.

12. His delegation believed that the distinction between the two types of wrongful acts and, consequently, between the two responsibility regimes should be maintained, though the current terminology should be reviewed.

13. His delegation regretted that the commentaries to the articles in chapter IV were very brief and that no details were given on the enforcement of the articles in chapters II and III of part two of the draft articles in cases of international crime, since article 51 expressly stipulated that an international crime entailed all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as were set out in articles 52 and 53.

14. Lastly, it was inconceivable that a viable regime governing criminal responsibility could fail to include an appropriate enforcement mechanism that would come into play before States resorted to countermeasures. While, in the current circumstances, it was unrealistic to entrust to international bodies the task of taking all the necessary decisions and measures to enforce the legal consequences of crimes, his delegation suggested that the Commission, in its second reading of the draft articles, should set forth general principles in that area.

15. With respect to countermeasures, his delegation felt that, in view of the rudimentary nature of the centralized mechanism for enforcing international law, individual means of constraint or coercion remained an indispensable component

of international law. It would be senseless to ignore reality and to claim that countermeasures had no place in the law of State responsibility.

16. The draft articles on countermeasures showed that the Commission, far from seeking to maintain the status quo in the law on the use of countermeasures, had undertaken to set out clear and precise rules designed to strengthen guarantees against the abuses which could arise from countermeasures. Thus, for example, countermeasures were seen not as a right of an injured State, but only as a circumstance that precluded the wrongfulness of an act of a State.

17. Moreover, recourse to countermeasures was not a direct and automatic consequence of the commission of an internationally wrongful act. It was subject to the definition, in advance, by the injured State of the behaviour considered as wrongful and to the presentation of a request for cessation and reparation. Furthermore, it was not available until after the State having committed the infraction had failed to respond to such a request in a satisfactory manner. Those conditions were intended to reduce the risk of premature, and therefore abusive, recourse to countermeasures.

18. Nonetheless, the injured State's obligation, in taking countermeasures, to fulfil its obligations in relation to dispute settlement (article 48, para. 2) seemed to prejudge the issue of whether part three of the draft articles, which concerned the dispute settlement regime, was mandatory. The Commission should therefore re-examine the content of articles 47 and 48 very carefully in the second reading.

19. The proportionality of countermeasures, dealt with in article 49, was one of the basic determinants of their legitimacy. That principle was all the more important in that the effects of a crime could impact the community of States to varying degrees; it should therefore apply individually to each injured State.

20. With respect to prohibited countermeasures (article 50), his delegation strongly supported the prohibitions listed in subparagraphs (a) to (e) of that article, most of which came under jus cogens.

21. Lastly, with respect to the provisions of part three of the draft articles, which concerned the settlement of disputes, his delegation preferred that the procedures envisaged should be optional, inasmuch as the draft articles covered the entire issue of State responsibility and, therefore, most of the disputes that could arise between States. In that connection, he regretted that the Commission had not yet found a way to avoid the risk of conflict between the procedures set forth in part three of the draft and those which might be applicable under other instruments in force between States which provided for means of dispute settlement that differed, inter alia, in terms of their hierarchy or the conditions for their implementation.

22. Ms. CONNELLY (Ireland) said that, although it was now universally recognized that individuals could bear criminal responsibility under international law for certain conduct, the notion that criminal responsibility should attach to States was, however, of a different order altogether. As a theoretical construct, it was certainly possible to conceive of the breach of an international obligation by a State as an international crime, give a general

definition of such a crime and identify some examples, as the Commission had done in draft article 19. There were undoubtedly core values of international law, such as the maintenance of international peace and security and respect for the intrinsic worth of each human being, and the infringement of those values not only by individuals but also by States should be viewed in the most serious light. She questioned, however, whether it served any useful purpose to designate such infringements as crimes attributable to a State as opposed to an individual.

23. This was due to a number of reasons. First, the question of enforcement posed much greater problems at the international than at the national level because institutions for the enforcement of obligations were, generally speaking, much more developed nationally than internationally. Indeed, not only did domestic criminal codes provide for the trial of suspected wrongdoers and for the punishment of those found guilty of an offence, but, at the national level, institutions, courts and tribunals also existed for the holding of such trials as well as detention facilities and institutions for the investigation of suspected criminal behaviour. No comparable institutions existed as yet in the international order. While there was indeed a plethora of international institutions designed to facilitate negotiation and cooperation among States, they fell far short of what was required for the effective enforcement of obligations the breach of which might give rise to criminal responsibility on the part of the State. It was true that the Security Council had been granted the competence to take such action as might be necessary to maintain or restore international peace and security. It was doubtful, however, whether, in the absence of the conferral of comparable competence upon an international body in relation to international crimes, States would ever be held to account in any meaningful way for the commission of international crimes.

24. Secondly, reparation for the breach of an international obligation was one of the principal features of civil liability in domestic law. While, in some systems, a duty to make reparation might also attach to criminal responsibility, it did so out of concern for the victim of the crime and as ancillary to the penal sanction which was imposed by way of society's condemnation of the affront to communal values. In retaining reparation at the heart of the schema of the legal consequences of an international crime, the Commission might be regarded as having paid too much attention to the injury suffered as a consequence of the wrongful act and too little attention to the societal dimension of the wrong. The question to be asked was whether the concept of an international crime signified not only that the international obligation breached was one of a particularly important kind but also that it was an obligation owed to the international community of States as a whole. In other words, the fact that under paragraph 3 of draft article 40 all States were to be regarded as injured States in relation to the commission of an international crime and that therefore all States could seek reparation from the wrongdoing State did not adequately address the collective nature of the wrong.

25. Accordingly, her delegation did not altogether agree with the statement by the Commission in its commentary to draft article 51 that it was immaterial whether a category of especially serious wrongful acts was called "crimes" or "exceptionally grave delicts". The concept of a crime had connotations which other forms of legal wrong did not have and the choice between the two terms

should be made by reference to the purpose of the categorization. Thus, if the categorization was meant to signify that some forms of internationally wrongful acts were so subversive of international order or morality that the collective interest of States required their prevention and suppression, then the term 'international crimes' might be appropriate. If, however, the categorization was intended as an acknowledgement that some internationally wrongful acts were by their nature or by virtue of their consequences significantly more serious than other acts of that kind and that that distinction should be reflected in the scope of the entitlement of an injured State to reparation, then some such term as 'exceptionally grave delicts' would seem to be more appropriate.

26. There was the further question of whether a categorization of wrongful acts, such as that proposed by the Commission, irrespective of what the categories were called, was meaningful and workable. It was true that, while the legal consequences of an internationally wrongful act were essentially the same, irrespective of whether the act was described as a delict or a crime, a number of additional consequences flowed from the categorization of the act as a crime. Indeed, even though the same forms of reparation applied to both categories of wrongful acts, namely restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, in the case of an international crime, some of the limitations on the entitlement of an injured State to obtain restitution or satisfaction were lifted. Moreover, the commission of an international crime by a State gave rise to a number of obligations for all other States, including an obligation not to recognize as lawful the situation created by the crime and to cooperate with other States in the application of the measures designed to eliminate the consequences of the crime which were set out in draft article 53.

27. The delegation of Ireland remained convinced that the question of the removal of the limitations on the entitlement of an injured State to obtain restitution in kind must be treated as a consequence of the categorization of a wrong rather than as a question of the equity of requiring restitution in kind in a particular case. With regard to the limitation on the entitlement of an injured State to obtain satisfaction, the impairing of the dignity of the wrongdoing State seemed to be such a vague and subjective concept as to be of dubious value whatever the categorization of the wrongful acts. As to the obligations listed in draft article 53, a case could be made that they should flow from the commission of any internationally wrongful act and not only from an international crime or an exceptionally grave delict. The international criminal responsibility of States was clearly one of those cases where the transposition of domestic law concepts into the international field required careful reflection.

The meeting rose at 4 p.m.